Supreme Court, U.S.
FILED

001932 JUN 25 2001

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

Mary Ann DiBari, individually and as lawful guardian of minor children, Krystal M. DiBari and Tiana N. DiBari,

Petitioner,

versus

Bedford Central School District *et al.*,

AND

Robert M. Altman *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred by overturning, in a manner that conflicts with decisions in the Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits and with the relevant decisions of this Court, the district court's judgment that the First Amendment was violated by an annual "Earth Day liturgy," devised and conducted by a public high school teacher as part of the curriculum, in which the entire student body was annually assembled before an earth-totem on a tripod, where various ceremonies would be conducted "to honor the Earth" as if it were a higher being, including the offering of "gifts" and "service" to the Earth in the form of speeches by the student leaders of each class.

2. Whether this Court should make explicit a uniform coercion standard for both Establishment Clause and Free Exercise Clause analysis in the public and secondary school context.

3. Whether the court of appeals, ruling in conflict with the Fourth Circuit, erred by vacating for lack of standing the district court's judgment striking down three other First Amendment violations by the defendant school district, even though petitioner is a municipal taxpayer with two children in the district high school.

Rule 14(1) (b) Statement

Petitioner is Mary Ann DiBari, individually and as lawful guardian of minor children, Krystal M. DiBari and Tiana N. DiBari.

Respondents are :

Robert M. **ALTMAN** and Victoria L. Altman, his wife, individually and as parents of minor children, Russell Altman and Ross Altman; Joseph M. Dinozzi and Cecile D. Dinozzi, his wife, individually and as parents of minor children, Jon M. Dinozzi, Daniel J.Dinozzi, Steven M. Dinozzi, and Joseph A. Dinozzi,

BEDFORD CENTRAL SCHOOL DISTRICT; Dr. Bruce Dennis, in his capacity as Superintendent of **Schools** of the **Bedford Central School District** and Agent/Administrator of its Board of Education; Jane Doe (name unknown, post currently vacant), in his or her capacity as Assistant Superintendent in charge of Curriculum and Instruction for the **Bedford Central School District** and Agent/Administrator of its Board of Education; Deborah Timberlake, in her capacity as President of the Board of Education of **Bedford Central School District**; Board of Education of the **Bedford Central School District**; James Young, in his capacity as Principal of the Pound Ridge Elementary School; James Alloy, in his capacity as Principal of Fox Lane Middle School; and Richard Kraemer, in his capacity as Principal of Fox Lane High School,

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, (App. 1a-68a), is reported at 245 F.3d 49 (2d Cir. 2001). Judgment was entered on March 27, 2001. The opinion of the United States District Court for the Southern District of New York was issued on May 21, 1999, and is reported at 45 F. Supp.2d 368 (S.D. N.Y. 1999). The District Court's supplemental opinions on standing, (App. 74a-79a), and attorney's fees, (App. 80-84a), and its final judgment and injunction, (App. 69a-73a), are not reported.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

42 U.S.C. § 1983, Civil action for deprivation of rights, provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1988, Proceedings in vindication of civil rights, reads in pertinent part as follows:

(b) Attorney's fees

> In any action or proceeding to enforce a provision of section [ ] . . .1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

STATEMENT OF THE CASE

This case arises out of what was, at the trial level, a successful First Amendment challenge by parents and students to activities sponsored by officials and schools of the Bedford Central School District (collectively, "Bedford"). Petitioner and her fellow plaintiffs, who are sincere practitioners of the Catholic religion, (App. 5a), brought a lawsuit under 42 U.S.C. §§ 1983 and 1988. The lawsuit alleged that the challenged activities (and others not the subject of this petition) violated the First Amendment's requirement of religious neutrality in the public schools and impinged on plaintiffs' Free Exercise rights.

After a full bench trial, the district court, applying this Court's line of First Amendment school cases, found that Bedford had committed four different violations of both the Establishment and Free Exercise Clauses, and that these violations were likely to be repeated absent injunctive relief. (App. 77a). The essential facts were not in dispute at trial or in the court of appeals.

The "Earth Day Liturgy"

What the district court rightly termed "the Earth Day liturgy" was devised by Fox Lane teacher Dale Saltzman as an ostensible means of complying with New York's 19th-century law requiring that public school children observe "Conservation Day." *New York Education Law*, § 810. (App. 143a-144a; Lodging,[1] p. 3).

A 1998 memorandum from Saltzman to all Fox Lane faculty and staff on the subject of Earth Day (the new name for "Conservation Day") admitted that "controversy swirls around *this piece of the curriculum* but the goals inherent in the event are worthwhile *to teach*." (Lodging, p.3) (emphasis added).[2] Those "goals" include "an *honoring of the Earth* as the home of all of us," which is to be shown by the offering of "metaphorical gifts from class officers *to the Earth*." *Id.* According to Saltzman, "without the gifts given by each of us to the others and *to the Earth* in the form of encouragement, compliments, help and *service*, we couldn't understand relationships and our empathic capacity." *Id.* Saltzman emphasized that "the core idea of respect for the Earth is the concept *to be driven home*." *Id.* The "honoring of the Earth" was to be conducted in conjunction with what Saltzman called "the Honoring of the Elders"—i.e., local senior citizens who are no relation to the Petitioner. (App. 145a). Thus, both "the Earth" and "the Elders" would be honored together. Bedford never called Saltzman as a witness at trial to refute or attempt to explain away this clear evidence of the ritual's aims.

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1. "Lodging" refers to the three trial exhibits lodged with this Court in 8 ½ x 11 format. Imperfections in the copies reflect the state of the original exhibits, which could not be enhanced.

2. All emphasis in further quotations in this brief is added, unless otherwise indicated.

Saltzman's vision was realized in the form of an annual ceremony in which the entire Fox Lane student body was called to assemble before an Earth-totem, which the district court described as "a large (5 feet in diameter) globe held up by three bamboo sticks in a green circle in the front of the high school as the focal point of the worship service." (App. 144a). The student newspaper noted that, "as in *every year*, symbolic gifts were presented *to the earth* by *the representatives of each class* in the form of a speech." (App. 144a; Lodging, p.1). A chorus of ceremonial tom-toms played throughout the ritual. (App. 144a; Lodging, p.2).[3] The student newspaper generally describes the ritual as "meeting in the front circle and conducting ceremonies *to honor the earth*." (Lodging, p.1). Students were urged to "do something that would make Mother Earth smile." (App. 144a).

The Earth Day liturgy included the equivalent of a sermon by Saltzman, aimed at inculcating a moral lesson related to the theme of "honoring the Earth." The district court found that during at least one Earth Day celebration Saltzman taught the students that "[w]e came from the earth, *we are part of the earth, and we are all involved in this cycle*. One day we will become [dead] and then we'll go back to the earth." (App. 145a). The district court found that this teaching was religious in nature, and corresponded to the Biblical teaching that man is dust and to dust he shall return. *Id.* The "sermon" for another Earth Day was that "there were too many people on this earth and we need to do something about it." *Id.* The district court found that this lesson was directly contrary to the teaching of *Genesis I* (to

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3. The photograph in the referenced trial exhibit shows students playing ceremonial tom-toms in a roped off area near the foot of the earth-totem on the tripod, which is positioned before the seated student body. The upper left photograph depicts the Earth-totem suspended on the tripod.

which the plaintiffs adhere as Roman Catholics) that man is commanded to fill the earth and subdue it. (App. 145a).

Bruce Dennis, the superintendent of all the Bedford schools, testified as follows about the Earth Day liturgy:

> **Question**: Would you have a problem with students presenting gifts to the Earth in an Earth Day ceremony?
>
> **Answer**: I had no difficulty at all with the activity that we ran at the high school.
>
> **Question**: *That would include offering gifts to the Earth*?
>
> **Answer**: Right. I had no problem with that. (App. 149a).

There is no question the Earth Day liturgy was a "piece of the curriculum," as the Saltzman memo stated. As Saltzman himself admitted: "Through the 1990's we have celebrated Earth Day *as a whole school* as [sic] 'Fox Lane Family.'" *Id.* Students were expected to attend the ritual precisely in order to have its message "enjoined," "reinforced" and "driven home." *Id.* A student complained about "a bunch of teachers and Student Government kids running a ceremony that *we had to watch.*" (Lodging, p. 2).

The district court concluded that plaintiffs, as sincere practitioners of the Roman Catholic religion, were entitled to relief from the Earth Day liturgy because:

> The worship of the Earth is a recognized religion (Gaia), which has been and is now current throughout the world. The liturgy of Earth Day at Fox Lane High School according to all the evidence in the case, went far beyond compliance with *Education Law* § 810, and evolved into a proceeding which takes on much of the attributes of

> the ceremonies of worship by organized religions. . . . (App. 144a).

Classroom Prayers to the Earth

The district court found that in addition to the Earth Day liturgy, Bedford had "sponsored prayers and the recital of a creed worshiping the Earth." (App. 146a). The prayers were contained in an audiotape played by a teacher in Bedford's middle school for a class of twelve and thirteen year old children, including plaintiff Tiana DiBari. (App. 14a, 146a). The tape, entitled "Listening to Nature," contains the same prayers as an accompanying book by the same title. (App. 147a). These prayers included the following:

> This is what we believe. The Mother of us all is the Earth. The Father is the Sun. The Grandfather is the Creator who bathed us with his mind and gave life to all things.
>
> Holy Earth Mother, the trees and all nature are witnesses of your thoughts and deeds.
>
> When you need to cut down a tree or remove a plant from your garden, reflect on this prayer: 'We know that we all are children of the same Mother Earth, of our Father Sun. But, we also know that one life must sometime give way to another, so that the one great life of all may continue unbroken.' (App. 13a, 146a-148a).

The teacher who conducted this activity claimed that whenever the prayers were uttered she would turn down the

volume on the tape player. The district court found, however, that Tiana DiBari heard the prayers. (App. 14a).

When confronted with this activity, Superintendent Dennis likewise testified that he saw nothing wrong it:

> **Question**: [Y]ou remember the prayer, Pray to Mother Earth [*sic*] talked about not offending the sun, did you hear that prayer?
>
> **Answer**: Yes.
>
> **Question**: Should that prayer be said in a public school?
>
> **Answer**: I didn't have any problem with that. (App. 149a).

The district court found that plaintiffs were entitled to relief because "This activity was a direct presentation to the children of an Earth-centered religious belief," (App. 147a), and that "the essential thrust of the book and the tape made from the book seems to be the promotion of Earth worship and prayer to the Earth, which offends both aspects of the First Amendment." (App. 148a).

Fashioning Images of a Hindu God

In successive years the DiNozzi and the DiBari children were instructed by a Bedford elementary school teacher to make images of the elephant-headed Hindu god Lord Ganesha, allegedly as part of a unit on the culture of India. (App. 115a-116a). The images were made of paper, but the teacher also instructed the students to make the images in clay. The district court found that "It is merely fortuitous that the third grade students never actually made the clay images of Ganesha, as instructed, because they ran out of time." (App. 118a).

The fashioning of the images was accompanied by the teacher's reading of the story of Ganesha's origin and a

description of the attributes of this deity, which the teacher wrote in her own hand and posted on the classroom wall:

> . . . Ganesha is a round-bellied, good-natured Hindu God. He loves to eat. Those who worship Ganesha bring him gifts of fruit. Ganesha is the god of wisdom and success. People pray to him before they begin important projects. (App. 116a-117a).

The plaintiffs' expert witness, Father Mitchell Pacwa, S.J., testified without contradiction that this activity would require Catholic children to violate their religion by disobeying the First Commandment's proscription against making images of gods they do not worship. (App. 118a).

Although the district court found no constitutional violation in the Ganesha story or the teacher's handwritten description of this Hindu god, it found that the exercise of having the little children fashion images of Ganesha was a violation of the First Amendment:

> This part of the lesson, however benign in purpose or intent, has the appearance to a child of that age that the school is communicating a message endorsing Lord Ganesha and the Hindu religion. Equally impermissible under the First Amendment is the *subtle coercive pressure* of instructing young impressionable students to make images of a god other than their own in violation of their religious beliefs. (App. 118a).

The district court further noted that:

> It should be simple to draw and conform to a line between the two challenged activities concerning Lord Ganesha. Permitting a school teacher to read a religious based story to students as part of a secular program is far removed from directing the same students to create a likeness or graven image of a god. (App. 119a).

The district court found that relief was especially warranted because both Superintendent Dennis and James Young, the elementary school principal at the time, both testified that they saw no problem with children being directed to make images of a Hindu god in public school classrooms. (App. 120a). As the district court concluded: "The Constitution provides otherwise." (App. 120a).

Worry Dolls

The district court found that plaintiff Joseph DiNozzi was instructed by his teacher to make talismans known as "worry dolls" and that personnel in the school store told Joseph, plaintiff Ross Altman, and other students that if they put the talismans under their pillows at night, they would be freed from worries and bad dreams. (App. 120a-121a).

The district court concluded that this activity was a "rank example of teaching superstition to children of a young and impressionable age. It assumes that an inanimate object has some occult power to relieve us from worry and assure a good night's sleep." (App. 121a). The court noted that plaintiffs' expert, Father Pacwa, testified without contradiction that plaintiffs' religion forbids the use of charms and all forms of divination, magic, and sorcery. *Id.*

Accordingly, the district court found that "sponsorship by the school of the Worry Dolls by selling them in the school store, or encouraging students to make them in class or in the discovery center, and use them for relief from worry, is a violation of the First Amendment. It prefers superstition over religion." (App. 121a).

The Relief Granted

The district court issued an injunction barring repetition of the four practices it found violative of the First Amendment. (App. 69a-73a). The court denied relief as to the other challenged activities which are not the subject of this petition. The district court further directed Bedford to

adopt guidelines to prevent future violations and to insure that Bedford would "abide by the Supreme Court's standards set forth in the cases quoted in this Court's Order and Opinion. . . ." (App. 71a). The court awarded attorney's fees and costs to plaintiffs as the prevailing parties, pursuant to 42 U.S.C. § 1988(b). Plaintiffs did not seek money damages.

Post-Trial Proceedings

Bedford filed a post-trial motion to dismiss all claims pertaining to elementary and middle school activities (i.e., everything but the Earth Day liturgy) on grounds that all but the DiBari plaintiffs had moved, or were about to move, out of the Bedford Central School District. The district court denied the motion because plaintiff Mary Ann DiBari is both a taxpayer and resident of the district (in the town of Pound Ridge) and has legal custody of two grandchildren who attended, and who still attend, Fox Lane High School in the school district. (App. 74a-79a).

The district court noted that plaintiffs had sought, and the court had granted, district-wide injunctive relief, not simply relief as to the elementary or middle school. (App. 77a). The court therefore concluded that its continued jurisdiction over the controversy was adequately based upon two grounds: "municipal taxpayer standing of plaintiff Mary Ann DiBari *as well as* her status as legal guardian of her two grandchildren." (App. 78a).

The Decision of the Court of Appeals

The United States Court of Appeals for the Second Circuit vacated or reversed all relief granted by the district court. The district court's judgment was affirmed only to the extent it had denied relief as to the challenged activities that are not the subject of this petition. (App. 67a-68a). (Petitioner's cross-appeal as to these other activities was dismissed.)

Concerning the Earth Day liturgy, the court of appeals found that it was not "coercive," even though Bedford itself had characterized the activity as a form of mandatory compliance with the New York State Education Law, and the entire high school student body attended every year. (App. 56a).[4] The court of appeals further found that there was no "intent" to establish religion, and that a reasonable observer would not conclude that an Earth Day liturgy "honoring the Earth" endorsed Earth-worship in any way. (App. 59a).

The court of appeals never reached the merits of the successful claims pertaining to children being directed to fashion images of Lord Ganesha, the presentation of prayers to the Earth in the classroom, and the school's promotion and sale of worry-doll talismans. The court of appeals held that no plaintiff had standing any longer to raise these claims—even though DiBari is still a taxpayer of the Bedford Central School District with two children in the district high school. (App. 43a-50a). The court of appeals held that only the claim pertaining to the Earth Day liturgy was justiciable, because plaintiff DiBari still has two children in Fox Lane High and was not simply a municipal taxpayer as to that claim. The court opined that municipal taxpayer standing as to the other claims would require "for example, that purchases of crayons, clay, or construction paper were made solely for the activities that plaintiffs challenged." (App. 49a).

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[4] The court of appeals asserted that "the district court did not find that the Earth Day program was coercive." (App. 56a). On the contrary, the district court's entire analysis was premised on this Court's "subtle coercive pressure" standard in *Lee v. Weisman*, 505 U.S. 577 (1992). (App. 100a).

REASONS FOR GRANTING THE WRIT

I. The decision of the court of appeals misstates the issues, ignores key record facts and conflicts with decisions of other circuits that follow this Court's impressionable youth standard of "subtle coercive pressure" for Establishment Clause violations in the public schools.

The First Amendment mandates strict neutrality by state actors in the field of religion. *Gillette v. United States*, 401 U.S. 437, 452 (1971). Even "subtle departures from neutrality" are forbidden by the Establishment Clause. *Id.* at 452.

The Subtle Coercion Test

Where the public schools are concerned, this Court has established a heightened level of scrutiny for state action alleged to violate the First Amendment's requirement of religious neutrality: "As we have observed before there are heightened concerns with protecting freedom of conscience from *subtle coercive pressure* in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Second Circuit itself has in the past expressly recognized this "impressionable youth" standard in school cases:

> To the impressionable student, even *the mere appearance* of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is *too dangerous too permit.*

Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir 1980), *cert. denied*, 454 U.S. 1123 (1981).

The Lemon Test

The subtle coercion test in elementary and secondary schools has supplemented this Court's longstanding three-prong test for Establishment Clause violations, enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), namely, that the challenged school practice (1) "have a secular legislative purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "not foster an excessive government entanglement with religion."

The Endorsement Test

In *Lynch v. Donnelly*, 465 U.S. 668, 688-693 (1984) (O'Connor, J., concurring), Justice O'Connor suggested that the second prong of the *Lemon* test, which looks to whether the challenged state action advances or inhibits religion, be formulated as an "endorsement test." Under this analysis, the challenged practice would be invalid if it has either the purpose or *effect* of communicating a message of government endorsement or disapproval of religion. *Id.* at 691-92. Accordingly, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court applied an endorsement test that "precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred," *id.* at 593, (internal quotations and citations omitted), or even "*appearing* to take a position on questions of religious belief." *Id.* at 594.

No matter which test is applied—subtle coercion, the *Lemon* test or the endorsement test—the standard of judicial scrutiny applicable to impressionable youth in the classroom is especially sensitive. This Court has noted repeatedly that even the *risk* of an Establishment Clause violation warrants injunctive relief—*without proof of any actual proselytization* by school authorities. *See, e.g., Levitt v. Committee for Pub. Educ. & Religious Liberty,* 413 U.S. 472, 480 (1973) ("substantial risk'); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 387 (1985)("substantial risk" requires injunction),

overruled in part on other grounds, *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

As to what actually constitutes "religion" for purposes of Establishment Clause analysis, this Court has made it clear that the State (including the public school system) is forbidden, not merely to establish the whole of a religion, but to promote *any* "particular kind of religious concept." *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961). For Establishment Clause and Free Exercise Clause analysis this Court has viewed "religion" with expansive broadness. *See, e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (reading of Bible verses without comments); *Torcaso*, (mere affirmation of belief in Supreme Being); *Wallace v. Jaffree*, 472 U.S. 38 (1984) (mere moment of silence for meditation or prayer); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (mere belief forbidding production of armaments). Furthermore, this Court has held that an activity need not be "logical, consistent or comprehensible to others" to qualify as a religion. *Thomas*, 450 U.S. at 714.

This Court, however, has not seen fit to undertake a comprehensive definition of "religion" or "religious" for purposes of either Establishment Clause or Free Exercise Clause analysis, and indeed "religion is not defined in the constitution." *Reynolds v. United States*, 98 U.S. 145, 162 (1878). The matter has been left to the federal trier of fact in each case.

As a Third Circuit trial court recognized, in a case cited by the district court here, the Establishment Clause forbids state promotion of a religious concept "even though it is neither a part of nor derives from a societally recognized religious sect." *Malnak v. Yogi*, 440 F. Supp. 1284, 1313 (D.N.J. 1977), *aff'd* , 592 F.2d 197 (3rd Cir. 1979). *Malnak* proposed certain general indicia for determining whether a challenged state practice involves the promotion of religion or a religious concept. These indicia were adopted by the Third Circuit in *Africa v. Pennsylvania*, 662 F.2d 1025, 1031

(3rd Cir. 1981), *cert. denied*, 456 U.S. 908 (1982), which the district court followed here. The indicia include whether the practice in question addresses fundamental and ultimate questions involving deep and imponderable matters, involves a belief system as opposed to an isolated teaching, or exhibits certain formal or external signs. *Africa*, 662 F.2d at 1031-1032. In *Malnak*, 592 F.2d at 209, however, the Third Circuit emphasized that

> Of course, a religion may exist *without any of these signs, so they are not determinative*, at least by their absence, in resolving a question of definition. But they can be helpful.

The Earth Day Liturgy

In assessing plaintiffs' challenged to this activity, the district court applied the constitutional principles laid down by this Court in the school cases, especially the subtle coercion test for impressionable youth enunciated in *Lee* (App. 97a-102a). The district court found that the effect of the Earth Day liturgy was to deify the Earth in the minds of impressionable students. (App. 144a). The district court further found that Saltzman, the coordinator of the whole spectacle,[5] used the occasion to sermonize on the religious concept of ultimate human destiny as part of a "cycle" of coming from and returning to the Earth, and humanity's supposed moral duty to eliminate overpopulation of the Earth, rather than multiply and subdue the Earth as enjoined by *Genesis I.* (App. 145a). These are the very kinds of "ultimate questions" deemed an indicia of religion in *Africa*. (App. 145a). The district court also noted that the Earth Day liturgy involved formal or external signs of religious tribute, *Africa*, 662 F.2d at 1032, including "symbolic" gifts to the Earth, presented *by the student leaders of each class* before

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[5] Lodging, p. 1: "Mr. Saltzman, the coordinator of Earth Day...", and Lodging. p. 2: "Mr. Saltzman designed the program and ran it..."

an Earth-totem which was the "focal point of the worship service." (App. 105a, 144a).

Surely, these facts established that the Earth Day liturgy carried at least the *risk* or the *appearance* of Bedford's endorsement of an Earth-centered spirituality. *Levitt*, 413 U.S. at 480; *County of Allegheny*, 492 U.S. at 594. Yet, in reversing the district court, the court of appeals misstated the issue, ignored the most crucial of the operative facts (the ritual's focus on "honoring" the Earth), and contradicted this Court's standard of heightened scrutiny for First Amendment cases involving "subtle coercive pressure" on impressionable youth in the public schools.

First of all, the court of appeals held that Bedford had no "intent" to establish religion. *Intent, however, was never the issue*, since plaintiffs stipulated that the activity was not being challenged under the "secular purpose" prong of the *Lemon* test.[6] Nor is there any *mens rea* requirement as such for Establishment Clause violations. *See, e.g., Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 287 (5th Cir. 1999)("in as much as we ultimately conclude that the program fails both the second and third prongs of the Lemon test, we need not determine whether the purpose for the Program articulated. . . is in fact sincere and not a sham."); *on rehearing en banc,* 240 F.3d 462 (5th Cir. 2001).

Rather, the central issue was whether the Earth Day liturgy subtly coerced impressionable students to "honor the Earth," thus engaging them in a form of Earth-worship, or at least appeared to endorse the religious concept that the Earth is a higher being which not only should be honored (along with "the Elders") but *served* by the students. (The Saltzman

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[6] In practice, it is rarely possible to prove the mental state of school officials as opposed to their official protestations of a purely secular purpose: "In school cases, the first consideration set forth in *Lemon*, the validity of the state's purpose, is rarely an issue." *Parents Ass'n v. Quinones*, 803 F.2d 1235, 1240 (2d Cir. 1988).

memo specifically stated that "gifts given by each of us . . . *to the Earth* in the form of *service*" was one of the "goals" to be inculcated by his ritual.) (Lodging, p.3)

The court of appeals also improperly framed the issue as whether Bedford had endorsed "the Gaia religion" as a whole, (App. 57a), whereas this Court's precedents forbid schools to promote *any* "religious concept," whether or not it is part of an entire organized religion. *See Torcaso, supra; Abington Sch. Dist., supra*; *Wallace, supra.*

Concerning the factual record, the court of appeals avoided any mention of teacher Saltzman's crucial admissions in the memorandum to all Fox Lane faculty members that the aim of the ritual he had devised and imposed upon the student body was "an *honoring* of the earth" and that "controversy swirls about this piece of the curriculum." (Lodging, p.3). The court asserted that there was "little probative mention of Gaia" in the record, (App. 57a), but, again, *the pertinent inquiry is not whether Bedford openly promoted the Gaia religion as such, but whether it had endorsed and/or subtly coerced children to accept the religious concept that the Earth is a higher being which must be "honored." This Bedford clearly did.*

Avoiding the substantial evidence that Bedford was coercing students to "honor the Earth," the court of appeals characterized the activity as merely promoting "respect for the earth," quoting only an isolated phrase from the inculpatory Saltzman memo. (App. 60a). Based on this selective presentation of the record, the court of appeals opined that a ritual designed to inculcate "respect" for the Earth is "not fundamentally different from rituals codified by Congress for showing respect to the United States flag," including the required way for people in uniform to salute the flag. (App. 60a).

Bedford is not the United States military, but a public school system full of impressionable children. It is quite telling that the court of appeals would choose compulsory

signs of respect for the American flag as its analogy, since this Court has held precisely that a compulsory flag salute violates the First Amendment rights of school children whose religion teaches them that the flag is a graven image they must not honor. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, this Court noted that while "those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life," *id.* 642 n. 19, the same is not true as to parents and children who regard the flag as a graven image. This Court provided a classic statement of the principle of constitutional law which compelled the district court to strike down the Earth Day liturgy:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

Barnette, 319 U.S. at 642.

Likewise, it is unconstitutional to coerce class leaders and other students to participate in ceremonies to "honor the Earth" with "metaphorical gifts" to the Earth as symbolized by a large globe set up on a tripod before the entire student body—no less a graven image than the American flag, and, moreover, one not at all hallowed by American tradition. (With or without this totem, of course, the entire ceremony

endorsed the religious concept of homage to the Earth as a higher being.)

Granted, in *Barnette* students were subjected to harsh penalties for declining the flag salute, but harsh penalties are not required under this Court's modern Establishment Clause precedents in the school cases. Only "subtle coercive pressure," *Lee*, 505 U.S. at 592, or even the *appearance* of endorsing a religious concept will suffice. *County of Allegheny*, 492 U.S. at 594. Thus, the plaintiff in *Lee* prevailed even though the only coercion applied to her was social pressure merely to *attend* and listen to, but not participate in, the fleeting, non-denominational prayer at a graduation ceremony.

The court of appeals found that the Earth Day liturgy was not coercive simply because, in the Court's opinion, attendance at the Earth Day liturgy was not "required." (App. 56a, 63a). Besides ignoring the trial record, that conclusion contradicts this Court's clear instructions on what constitutes coercion in the elementary and secondary school setting. As this Court declared in *Engel*, 370 U.S. at 430: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of *direct* governmental compulsion. . . ." Thus, in *Lee*, even though there was a *stipulation* that attendance at graduation ceremonies was voluntary, *Lee*, 505 U.S. at 594-95, this Court found impermissible coercion because "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. . . government may no more use social pressure to enforce orthodoxy than it may use *more direct* means." *Id.* at 593-594.

Likewise, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), this Court found that even a student-led prayer uttered before *extracurricular* football games involved sufficient coercion to violate the Establishment Clause

because students "feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football" and because "'adolescents are often susceptible to pressure from their peers towards conformity . . . in matters of social convention.'" *Id.* at 311-312 (quoting *Lee*, 505 U.S. at 593).

Furthermore, the decision of the court of appeals here contradicts decisions in the Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits which, especially in view of *Lee*, have held that in the public school context—and even with *adults* in the larger society—"subtle coercive pressure" suffices for an Establishment Clause violation by state actors, regardless of whether the challenged activity is nominally voluntary.[7] *Doe, v. Beaumont Indep. Sch. Dist.* 173 F.3d 274, 290 (5th Cir. 1999) (coercion found in voluntary school counseling program involving ministers because "[a] selected student who does not wish to participate is placed in the untenable position of having to choose either to attend a session he truly wants to avoid or to decline the 'invitation' and thereby risk actual or perceived opprobrium and ostracism from BISD administrators and faculty, not to mention from his peers."), *on rehearing en banc*, 240 F.3d 462 (5th Cir. 2001); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1066 (6th Cir. 1987) ("The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."), *cert. denied*, 484 U.S.

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[7] Petitioner recognizes that proof of state coercion is not *necessary* for an Establishment Clause claim, but that such coercion is *sufficient* proof in a closer case. *See Lee*, 505 U.S. at 604 (Blackmun, J., concurring) ("Although our precedents make clear that proof of government coercion is not *necessary* to prove an Establishment Clause violation, it is *sufficient*. Government [coercion] ... is an obvious indication that the government is endorsing or promoting religion.")

1066 (1988); *Kerr v. Farrey*, 95 F.3d 472, 478 (7th Cir. 1996) (applying "outsider" test of coercion enunciated in *Lee* to prison requirement of attending religion-based narcotics rehab program: "There is virtually no dispute in the Supreme Court that, in principle, the first kind of case, the 'outsider' case, falls within the scope of the Establishment Clause ."); *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985) ("The option of nonparticipation does not save state action from an establishment clause challenge."), *cert. denied*, 474 U.S. 826 (1985); *Brown v. Gwinnett County Sch. Dist.* 112 F.3d 1464, 1473 (11th Cir. 1997) (statute allowing moment of silence upheld only because "The facts in this case do not indicate that the state has created a situation in which students are faced with *public pressure or peer pressure* to participate in religious activity.")

The Earth Day liturgy certainly involved impermissible coercion under this Court's standard of Establishment Clause review in school cases, as followed by the other circuits. *What student at Bedford would not feel intense social pressure to attend Saltzman's Earth Day liturgy, along with the rest of the "Fox Lane Family"?* The court of appeals completely disregarded Supreme Court and circuit court precedent in this area, fashioning instead a rule of law that would allow public schools to engage in Establishment Clause violations so long as they provide an opt-out. That is not, and never has been, the law.

In any case, the overwhelming evidence—all of it ignored by the court of appeals—is that student attendance was *not* optional, no matter what Bedford belatedly claimed at trial. As the district court found, Bedford defended the Earth Day liturgy as its means of complying with the *legal requirement* that students observe "Conservation Day." Saltzman's memo describes the ritual as "this piece of the curriculum," and notes that "through the 1990's we have celebrated Earth Day as a whole school as 'Fox Lane Family.'" (Lodging, p.3) The court of appeals made no

mention of these facts. The court of appeals also navigated around the student newspaper's report of a student's complaint about "a ceremony that *we had to watch*."

As if these undisputed record facts did not exist, the court of appeals noted only that "the principal of Fox Lane High testified that attendance was not compulsory, and we see no indication that the district court discredited that testimony." (App. 63a). The district court had no obligation to "discredit" the principal's testimony, since the evidence to the contrary was overwhelming. The students were evidently unaware of their alleged "option" to avoid the ceremony. As the student newspaper reported, students regarded the Earth Day liturgy as something "we had to watch." (Lodging, p.1). That is precisely the way Saltzman and the Fox Lane administration wanted it—until Bedford was sued.

In sum, the decision of the court of appeals ignores the record and contradicts this Court's coercion standard for Establishment Clause analysis in the elementary and secondary school context, as well as the decisions of other circuits which follow that standard.

II. There should be a uniform coercion standard under both religion clauses in the public school context.

Further ignoring the record, the court of appeals asserted that the district court made "no findings sufficient to support a conclusion of free exercise violation." (App. 62a). *That is simply not true.* As noted in the previous point and Statement of the Case, the district court cited overwhelming evidence that the Earth Day liturgy was part of the Bedford curriculum and was thus compulsory. Tellingly, teacher Saltzman never appeared at trial to explain how his memo to all faculty members could be interpreted in any other way than as conclusive evidence that his ritual had been, and would

remain, a school-wide curricular activity in which all students were expected to participate.

The court of appeals miscasts the issue here as being simply whether the Earth Day ritual was a "restriction of plaintiffs' religious activities" that imposed a "substantial burden on the observation of a central religious belief." (App. 59a) (quoting *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85 (1990)). Rather, the issue is more precisely whether Bedford's Earth Day liturgy "put[ ] substantial pressure on [plaintiffs] to modify [their] behavior and to violate [their] beliefs." *Thomas*, 450 U.S. at 718. And, "while the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.*

The district court's factual findings fully support its conclusion that the Earth Day liturgy involved such compulsion. Indeed, the student newspaper itself reported that the crux of the ritual was "ceremonies to honor the Earth," by which, as teacher Saltzman put it, the concept of giving honor to the Earth would be "*enjoined* and reinforced." (Lodging, p. 3). There is no dispute that plaintiffs testified that their Roman Catholic religion was violated by participation in ceremonies bestowing honor on the Earth, as represented by the graven image of an Earth-totem on stilts—even if that participation was limited to passive membership in the "congregation," which consisted of the entire student body.

The court of appeals hinged its reversal of the district court on the legal conclusion that "Absent a finding that students were *required to attend* or participate in the Earth Day ceremonies, we conclude that there was no interference with plaintiffs' free exercise of their chosen religion." (App. 63). By implication, then, the court of appeals would agree that if attendance were mandatory, a free exercise violation would result.

Again, *all the evidence on which the district court relied shows that attendance at the Earth Day liturgy was indeed required because the ritual was nothing less than part of the curriculum.* It was hardly necessary for the district court to make an explicit finding that students were required to participate in a curricular event devised, coordinated, and conducted by a teacher for the whole student body. Nor was the district court obliged to disregard this evidence merely because the former high school principal announced a hitherto recondite policy that attendance was not required.

In any event, this Court's school cases in the Establishment Clause context demonstrate that optional attendance is of little moment. At least the same level of "subtle coercive pressure" to attend is present here as was present with the non-mandatory activities at issue in *Lee* and *Santa Fe.* Surely, then, the less than-subtle coercive pressure to join the "Fox Lane Family" by assembling before an Earth-totem to give honor to the Earth and listen to Saltzman's sermons, ought to suffice for both an Establishment Clause and Free Exercise violation in this case.

Petitioner respectfully submits that, at least in school cases involving impressionable children, this Court should make explicit what appears to be an implicit uniform coercion standard for both Establishment Clause and Free Exercise violations in the public schools. As this Court held in *Abington Sch. Dist.*, 374 U.S. at 223, the purpose of the Free Exercise Clause is:

> to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show *the coercive effect* of the enactment as it operates against him in the practice of his religion.

As the district court noted, the Second Circuit itself "has applied this 'coercion' test when analyzing whether a challenged practice within the field of public education

infringes on a plaintiff's free exercise rights." (App. 107a) (citing *Smith v. Board of Educ.*, 844 F.2d 90, 92 (2d Cir.1988)).

The question is what *level* of coercion is required to make out a Free Exercise Clause violation in the public school setting? It would be anomalous to hold that only the Establishment Clause, but not the Free Exercise Clause, is violated when an impressionable child is subtly (and in this case not-so-subtly) coerced to participate in a public school activity that promotes a religious concept or practice contrary to the faith in which the child was reared. That the standard of coercion should be uniform for both religion clauses in school cases is certainly suggested by this Court's language in *Lee*, 505 U.S. at 592: "As we have observed before there are heightened concerns with protecting *freedom of conscience* from subtle coercive pressure in the elementary and secondary public schools."

Freedom of conscience is surely no less a concern under the Free Exercise Clause than it is under the Establishment Clause. Thus, whether or not the challenged activity in this case was formally "required" of students, under a uniform standard prohibiting public school authorities from engaging in subtle coercion in violation of either religion clause, the district court's finding of a Free Exercise violation was well-supported. The reversal by the court of appeals, on the other hand, is based on a systematic disregard of key record facts, and the erroneous legal conclusion, contrary to the holdings of this Court and other circuits, that public school activities implicating religion can escape constitutional challenge if they are denominated "optional."

III. The court of appeals erred in holding that petitioner, as a municipal taxpayer, lacked standing to challenge the other activities the district court had struck down, and the resulting conflict with the Fourth Circuit should be resolved by this Court.

As discussed in the Statement of Case, the district court struck down three additional ventures into the realm of spirituality by Bedford personnel: (1) directing students to make images of the Hindu deity, Lord Ganesha, (2) playing an audiotape of explicit prayers to the Earth in the classroom (including "Holy Earth Mother, the trees and all nature are witnesses of your thoughts and deeds."), and (3) having the children make and purchase at school "worry-doll" talismans they were assured would free them from worries and bad dreams.

Unless the First Amendment exempts Hinduism, Earth-worship, and voodooism from its requirement of religious neutrality by state actors, these activities could not have survived even-handed First Amendment scrutiny on the merits. The district court, recognizing that the First Amendment must be applied equally to all religions, struck down the activities. The court of appeals, however, neatly avoided the merits by vacating the district court's judgment and injunction solely on the grounds that petitioner Mary Ann DiBari lacked standing, even though she is a taxpayer of the Bedford Central School District and has two children who still attend the district's Fox Lane High School. (App. 35a).

First of all, the district court correctly concluded that Petitioner, who has custody of two grandchildren in Bedford's high school, was entitled to a district-wide injunction since the challenged activities (such as audio-taped prayers to the Earth) were likely to recur in any district

school. (App. 78a).Thus, Petitioner had standing simply because she had two children in the defendant school system.

Further, the district court correctly concluded that as a municipal taxpayer petitioner has standing to challenge all constitutional violations committed by Bedford's paid employees, whose salaries her real estate tax dollars directly subsidize. As this Court explained many years ago:

> *The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate.* . . . The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

Massachusetts v. Mellon, 262 U.S. 447, 486-87 (1923) (citations omitted).

There is no genuine dispute that Mary Ann DiBari's tax dollars are spent on the salaries of the personnel who have committed the constitutional violations at issue in this case. Those constitutional violations involved classroom time, school facilities, and school materials. The district court so found: "The record is clear that unless prevented by the court, the activities will continue in the future. Public money supported that conduct and those who engaged in it. Actions of the school district are funded, in large part, by local real property taxes." (App. 77a).

Yet, the court of appeals overturned the district court's finding of standing because there was no "showing of a measurable appropriation or loss of revenue attributable to the challenged activities" at Fox Lane Middle and Pound Ridge Elementary. (App. 49a). The court of appeals held that Petitioner would literally have to show, for example, "that

purchases of crayons, clay, or construction paper were made solely for the activities that plaintiffs challenged." *Id.*

The requirement that a municipal taxpayer with children in the school system must demonstrate a "measurable appropriation" of local tax revenue, beyond what is obvious with regard to teacher salaries and facilities, would lead to absurd results. For example, if a school district directed every teacher in the elementary school to open and close each day by leading the students in the Lord's Prayer, no school district taxpayer—not even a taxpayer with children in the high school—could challenge the activity unless a specific sum was appropriated for time spent praying. Even more absurd, the elementary school teachers could give an hour-long sermon on the Gospel each day, and a local taxpayer with children in the high school would have no legal remedy unless salaries were specifically appropriated for the sermons.

The court of appeals' unreasonable holding conflicts with the commonsensical approach of the Fourth Circuit in *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000). In *Koenick*, a municipal taxpayer filed an action challenging the constitutionality of a Maryland statute that provided for a public school holiday on the Friday preceding and Monday following Easter. *Id.* at 261. The municipal taxpayer claimed an alleged injury that was caused by the expenditures of her tax revenues to pay for the holiday for the school employees. *Id.* at 263. The Fourth Circuit determined—as did the district court in this case—that *the municipal taxpayer had standing because it was undisputed that tax revenues funded the public school system* and thereby funded the paid, statutory holidays for the school employees. *Id.* Therefore, the municipal taxpayer had standing because she indirectly bore the burden of funding a paid public school holiday around Easter. *Id.*

Mary Ann DiBari should have the same standing as did the plaintiff in *Koenick*, especially since she has children in

the defendant school district and sought, and was granted, district-wide injunctive relief. The court of appeals' conflict with *Koenick* presents a good opportunity for this Court to clarify the type of injury that suffices for municipal taxpayer standing, particularly in First Amendment school cases like this one.

In *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), four of the eight justices deciding the case agreed that for standing purposes state and federal taxpayers are similar to each other, but are distinct from municipal taxpayers. *Id.* at 613 (Kennedy, J., with Rehnquist, C.J., and Stevens and Scalia, JJ., joining.). The plurality explained that this Court has refused to confer standing on a state (or federal) taxpayer absent a showing of "direct injury." *Id.* But the same conclusion does not apply to municipal taxpayers, because a municipal taxpayer's interest in the application of municipal revenues is "direct and immediate." *Id.* (quoting *Frothingham, a/k/a Mellon*, 262 U.S. at 486-87). Thus, it would appear that at least four justices of this Court are of the view that the only injury a municipal taxpayer need show is an improper municipal expenditure. *See Cammack v. Waihee*, 932 F.2d 765, 700 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992).

Mary Ann DiBari has shown such an injury, as the district court found. Accordingly, this Court should grant certiorari, resolve the conflict between the circuits, and review on the merits the decision of the court of appeals to vacate the district court's remedy for blatant First Amendment violations by Bedford personnel.[8]

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8. Any concerns of the court of appeals concerning vagueness in the district court's injunction, (App. 65a), could be addressed by a remand for the purpose of refining its terms. *See, e.g., Rosen v. Siegel*, 106 F.3d 28, 33 (2d Cir.1997) (remanding for clarification of district court order granting an injunction but leaving the injunction intact).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 25, 2001

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

Robert M. **ALTMAN** and Victoria L. Altman, his wife, individually and as parents of minor children, Russell Altman and Ross Altman; Mary Ann Dibari, individually and as lawful guardian of minor children Krystal M. Dibari and Tiana N. Dibari; Joseph M. Dinozzi and Cecile D. Dinozzi, his wife, individually and as parents of minor children, Jon M. Dinozzi, Daniel J.Dinozzi, Steven M. Dinozzi, and Joseph A. Dinozzi, Plaintiffs-Appellees-Cross-

Appellants,

v.

BEDFORD CENTRAL SCHOOL DISTRICT; Dr. Bruce Dennis, in his capacity as Superintendent of **Schools** of the **Bedford Central School District** and Agent/Administrator of its Board of Education; Jane Doe (name unknown, post currently vacant), in his or her capacity as Assistant Superintendent in charge of Curriculum and Instruction for the **Bedford Central School District** and Agent/Administrator of its Board of Education; Deborah Timberlake, in her capacity as President of the Board of Education of **Bedford Central School District**; Board of Education of the **Bedford Central School District**; James Young, in his capacity as Principal of the Pound Ridge Elementary School; James Alloy, in his capacity as Principal of Fox Lane Middle School; and

Richard Kraemer, in his capacity as Principal of Fox Lane High School,

Defendants-Appellants-Cross-Appellees.

Docket Nos. 99-7969 (L), 99-9001.

Argued: May 11, 2000.
Decided: March 27, 2001.

KEARSE, Circuit Judge:

Defendants Bedford Central School District *et al.* ("Bedford" or "School District") appeal from so much of a final judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, *Judge,* as (a) declared that certain school activities violated plaintiffs' rights under the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution, (b) enjoined the School District and certain of its administrators and other personnel from sponsoring or encouraging those activities, and (c) awarded attorneys' fees to plaintiffs. Following a bench trial, the district court found, to the extent pertinent to Bedford's appeal, that the Establishment and Free Exercise Clauses were violated by certain activities involving a Hindu god ("Ganesha" or "Ganesh"), "worry dolls," and celebrations of the Earth and nature. On appeal, Bedford contends principally that the court should have dismissed all challenges to activities at one of its schools because at the time of trial no plaintiff had standing to challenge those activities, and that the court

erred in its application of First Amendment principles to the enjoined activities. Plaintiffs cross-appeal from other parts of the judgment, contending that the court erred in dismissing their challenges to certain other activities.

For the reasons that follow, we conclude principally that the judgment should be (1) vacated insofar as it dealt with activities at two schools as to which plaintiffs no longer have standing; (2) reversed insofar as it declared School District programs to violate the First Amendment, ordered the School District to issue guidelines and cease certain activities, and awarded plaintiffs attorneys' fees pursuant to 42 U.S.C. § 1988 (1994 & Supp. IV 1998); and (3) affirmed to the extent that it dismissed plaintiffs' challenges to other activities.

I. BACKGROUND

The following description is taken principally from the district court's posttrial findings of facts and conclusions of law. Except as indicated, the facts are largely undisputed.

A. *The Parties and the Present Action*

Bedford, located in Westchester County, New York, operates public schools including the Pound Ridge Elementary School ("Pound Ridge Elementary"), the Fox Lane Middle School ("Fox Lane Middle"), and the Fox Lane High School ("Fox Lane High"). The individual defendants are School District administrators sued in their official capacities.

Plaintiffs are members of three families who, when the present action was commenced in 1996, were residents and/or taxpayers in the School District. Robert M. Altman and Victoria L. Altman (collectively "the Altmans") are the parents of Russell and Ross Altman. Russell had attended Pound Ridge Elementary until fifth grade; Ross had attended a Bedford elementary school until third grade. In or about 1996, the Altmans enrolled Russell and Ross instead in parochial school pending resolution of the family's criticisms of certain Bedford school activities.

Plaintiff Mary Ann DiBari is the grandmother and legal guardian of Krystal M. DiBari and Tiana N. DiBari. At the time of trial, Krystal attended Fox Lane High and previously had attended Fox Lane Middle. Tiana N. DiBari attended Fox Lane Middle at the time of trial and previously had attended Pound Ridge Elementary.

Plaintiffs Joseph M. DiNozzi and Cecile D. DiNozzi (collectively the "DiNozzis") are the parents of Jon M. DiNozzi, Daniel J. DiNozzi, Steven M. DiNozzi, and Joseph A. DiNozzi. At the time of trial, Jon attended Fox Lane High and previously had attended Pound Ridge Elementary. Daniel had previously attended Fox Lane Middle; Steven and Joseph had previously attended Pound Ridge Elementary. In 1995, the DiNozzis had removed Daniel, Steven, and Joseph from their respective public schools and sent them to parochial school pending resolution of the present controversy.

Plaintiffs brought the present action in October 1996 principally under 42 U.S.C. § 1983, seeking injunctive relief and alleging that they are sincere practitioners of the Roman Catholic religion and that a large number of programs in the Bedford schools exposed impressionable children to activities that plaintiffs characterized as

(a) The promotion of satanism and occultism, pagan religions and "New Age spirituality", the latter being a religion which promotes as the goal of spiritual progress the full actualization of the human person as the godhead;
(b) Instruction in techniques of meditation, yoga, guided-imagery and self- hypnosis; "crystal power", use of the "right-brain" and other "self- realization" techniques;

(c) Psychological evaluation and treatment by means of contrived incidents for self-revelation, psychodrama, role-playing, "stress management", so-called "stress thermometers", relaxation and deep-breathing, blindfold walks, encounter groups and other techniques designed to modify human behavior or to pry into the student's innermost thoughts and family life;

(d) Instruction in "decision-making" by which matters of morality are reduced to a process of choosing options divorced from objective moral norms, in which process the child, not the parents or God, is the final arbiter of what is right or wrong conduct in a given situation;

(e) Transpersonal "affective" teaching methods by which students are subjected to "learning" intuitively by "sharing" innermost fears, dreams, likes, dislikes, aversions, failures, insecurities and the intimate details of their personal and family lives with strangers in a classroom.

(Amended and Supplemental Complaint § 18.) Plaintiffs asserted principally that the challenged activities, including those described in Parts I.B. and I.C. below, violated the Establishment and Free Exercise Clauses of the First Amendment, the Fourteenth Amendment rights of plaintiff parents to raise their children as they see fit, and the Fourteenth Amendment rights of the minor plaintiffs to privacy.

When this action was tried in early 1999, Ross Altman was the only plaintiff who was not beyond elementary-school age. Approximately one year prior to trial, however, as discussed in Parts I.E. and II below, the Altman family had relocated to the State of Connecticut, leaving no plaintiff who attended or was eligible to attend Pound Ridge Elementary. In addition, after trial and prior to this appeal, Tiana DiBari graduated from Fox Lane Middle and the DiNozzi Family relocated to the State of Delaware. These events left no plaintiff attending or eligible to attend Fox Lane Middle.

B. *Activities Found Impermissible by the District Court*

Following a five-day bench trial in February and March 1999, the district court found, to the extent pertinent to Bedford's appeal, that certain aspects of four of the challenged activities, to wit, those involving Ganesha, worry dolls, Earth Day, and a "Listening to Nature" tape, violated plaintiffs' rights under the Establishment and Free Exercise Clauses of the First Amendment to the Constitution. *See* 45 F.Supp.2d 368 (1999). The evidence with respect to those activities was as follows.

1. *Ganesha*

During the 1992-93 school year, Pound Ridge Elementary conducted an international enrichment theme week. In one fourth-grade class, Jacqueline Reizes taught her students, who included Krystal DiBari, about India. Reizes selected India because she felt it suitable to the theme week's goal of supplementing the curriculum with music, art, dance, and cooking. She designed an elaborate lesson plan that included instruction in the geography and culture of India, and she decorated her classroom with travel posters of India and with Indian textiles and fabrics. Classroom activities included instruction in cooking Indian food, making batik textiles and paisley designs, constructing mosaics out of beans, and replicating an Indian board game.

In addition, on one afternoon the class read a two-page story entitled "How Ganesh got his Elephant Head." The story described how, in a fit of anger, "SHIVA, THE MIGHTY GOD with the blue throat," who initially did not

realize that Ganesha was his son, cut off Ganesha's head and then restored Ganesha to life by slaying an elephant and fitting the elephant's head on Ganesha's body. *But see* 45 F.Supp.2d at 383 nn. 9-10 (According to legend, Ganesha was made of clay by his mother Parvati, Hindu goddess wife of Shiva. According to the Encyclopedia Britannica, Ganesha was beheaded by Shiva's attendants in battle; to ease Parvati's pain, Shiva promised to cut off the head of the first living creature he encountered--an elephant, as it happened--and join it to Ganesha's body.) Reizes displayed in her classroom a variety of signs describing Ganesha, including the following:

> Ganesha's head was accidentally cut off when he was a child. Shiva, in a panic, replaced it with the first head he found--an elephant's head. Ganesha is a round-bellied, good-natured Hindu God. He loves to eat. Those who worship Ganesha bring him gifts of fruit.Ganesha is the god of wisdom and success. People pray to him before they begin important projects.

45 F.Supp.2d. at 383. Following the reading of the story, students constructed depictions of Ganesha. One, introduced at trial, consisted of a construction-paper representation of the head of an elephant with eyes, ears, and a trunk.

During the 1993-94 school year, Reizes taught a third-grade class that included Joseph DiNozzi and Tiana DiBari. In a social studies unit on India, Reizes again read the

Ganesha story. She also planned for her students to construct likenesses of Ganesha out of clay; however, the class ran out of time, and that project was not begun. Reizes testified at trial that there was no religious significance in her instruction about Ganesha or about India in general and that she was not attempting to convey any religious message.

Plaintiffs contended that the compulsion inherent in such classroom activities violated the minor plaintiffs' Free Exercise rights. In addition, Mary Ann DiBari and plaintiffs' expert witness, Father Mitchell Pacwa, S.J., testified at trial that creating representations of Ganesha violated the Second Commandment's proscription against fashioning images of gods of other religions.

2. *Worry Dolls*

The construction of worry dolls was part of a project sponsored by Pound Ridge Elementary's Discovery Center for arts and crafts. These brightly colored dolls are about 1 inch high and appear to be made from toothpicks, thread, and wire. Joseph DiNozzi made worry dolls as part of the project. Such dolls were also sold at the school store, and Joseph testified that a store employee told him that if he put the dolls under his pillow at night, they "would chase away ... bad dreams."

Ross Altman testified that he constructed worry dolls in a class taught by Reizes. He stated that Reizes told the class to place the worry dolls "underneath our pillows and

pray to the gods and take all our worries ... away and dream." Reizes denied having made such a statement.

Father Pacwa testified that such instructions violated Catholic tenets against the use of charms.

3. *Earth Day*

Each year, Fox Lane High observed "Earth Day," a day of activities centered around the theme of conservation of the environment and preservation of the planet. The general thrust of the program was usually the same. The celebration was organized by Youth in Action, a high-school club that promoted social and environmental awareness. Customarily, a globe five feet in diameter was placed in a circular outdoor area; students, grouped by grade, gathered around the globe. Local senior citizens were invited to the ceremony in order to foster community spirit. Representatives of each class presented symbolic gifts to the Earth in the form of speeches. Youth in Action's faculty advisor Dale Saltzman normally spoke of "reflecting on the simple things that the Earth provides for us and maybe, for one day, not taking them for granted."

The program components varied somewhat from year to year. In some years, the ceremony would begin with a drum roll as students took their places. One year, a display of tombstones was used to symbolize endangered and extinct species. In 1996, Earth Day focused on the preservation of rain forests, with students marching around the circle carrying banners displaying the current state of

rain forests around the world. In 1998, the event included speeches by Fox Lane High faculty members as well as a musical performance.

Jon DiNozzi testified that at one Earth Day event, Saltzman stated that "[w]e came from the Earth, we're part of the Earth and we're all involved in this cycle. One day we'll become [dead] and then we'll go back to the Earth." 45 F.Supp.2d at 394 (alteration in original). DiNozzi testified that in another year, Saltzman made a speech "mainly about there's just too many people on this Earth" and about how "[w]e need to do something about it."

Bedford characterized the Earth Day activities as, in part, an effort to comply with § 810 of the New York Education Law, which dates back to 1888 and designates the last Friday of April as "Conservation Day." The statute provides as follows:

> It shall be the duty of the authorities of every public school in this state to assemble the pupils in their charge on that day in the school building, or elsewhere, as they may deem proper, and to provide for and conduct (1) such exercises as shall tend to encourage the planting, protection and preservation of trees and shrubs, and an acquaintance with the best methods to be adopted to accomplish such results, and (2) such lectures, pictures or tours, as shall tend to increase the interest and knowledge of such pupils in the fish and wild life, soil and water of the state.

N.Y. Educ. Law § 810(2) (McKinney 2000). According to the Fox Lane High principal, attendance at Earth Day was not compulsory.

4. *The "Listening to Nature" Tape*

Ruthann Funari, who taught life sciences at Fox Lane Middle, instructed her students to compile "data sheets" in class with respect to each season of the year. While students were noting their observations in their respective science research notebooks, Funari would occasionally play music in the background, which she regarded "as a way to have the natural environment which they had observed be more present in the classroom." For the summer study, she played Vivaldi's "Four Seasons." During the fall, she played a tape called "Listening to Nature." The latter, which has a companion book that was not read to the students, contains various sounds of nature, such as birds, frogs, rivers, and ocean waves. At several times on the tape, a voice can be heard intoning nature-theme passages such as the following excerpt (attributed in the accompanying book to turn-of-the century naturalist John Muir):

> Here is calm so deep, grasses cease waving ... wonderful how completely everything in wild nature fits into us, as if truly part and parent of us. The sun shines not on us, but in us. The rivers flow not past, but through us, thrilling, tingling, vibrating every fiber and cell of the substance of our bodies, making them glide and sing.

J. Cornell, *Listening to Nature, How to Deepen Your Awareness of Nature* 42 (1987). The tape also included prayers such as the following Taos Indian invocation:

> Now this is what we believe.
> The Mother of us all is Earth.
> The Father is the Sun.
> The Grandfather is the Creator
> Who bathed us with his mind
> And gave life to all things.
> The Brother is the beasts and trees.
> The Sister is that with wings.
> We are the children of Earth
> And do it no harm in any way.
> Nor do we offend the Sun
> By not greeting it at dawn.
> We praise our Grandfather for his creation.
> We share the same breath together--
> The beasts, the trees, the birds, the man.

Id. at 64. The tape also included the following passage (attributed in the book to Saint Francis of Assissi):

> Lord, make me an instrument of Thy peace.
> Where there is hatred, let me sow love;
> Where there is injury, pardon;
> Where there is doubt, faith;
> Where there is despair, hope;
> Where there is darkness, light;
> Where there is sadness, joy.

> O Divine Master, grant that I may not so much seek
> To be consoled, as to console,
> To be understood, as to understand,
> To be loved, as to love.
> For it is in giving that we receive, It is in pardoning,
> that we are pardoned,
> It is in dying to self that we are born to eternal life.

Id. at 74. Funari testified that she lowered the volume on the tape whenever words were being spoken. Mary Ann DiBari testified, however, that her granddaughter Tiana heard the prayers or invocations.

C. *Other Challenged Activities*

Plaintiffs also challenged a number of other programs. They included the following.

1. *Magic: The Gathering*

Magic: The Gathering ("MTG" or "Magic") is a complex, strategy-based card game that was played by students in extracurricular clubs that met before school at Pound Ridge Elementary and after school at Fox Lane Middle. Each MTG player is a "wizard" attempting to reduce his opponents' "life total" points from twenty to zero. By drawing and playing cards, players attempt to

summon "creatures" and cast "spells" in order to reduce their opponents' point total. The playing cards include depictions of zombies, goblins, vampires, and similar creatures. Students were allowed to participate in MTG only with prior written parental consent.

Plaintiffs challenged the School District's endorsement and promotion of MTG, contending, *inter alia,* that the game glorified worship of Satan, the practice of witchcraft, and blasphemy against Jesus Christ, and that the sponsorship subtly coerced students into participating.

2. *Yoga Exercises*

In 1998, Fox Lane High's athletic director invited Agia Akal Singh Khalsa, a Sikh minister, to conduct yoga exercises for students in gym class. Khalsa, who wore a Sikh turban, a traditional Sikh robe, and the beard of a Sikh minister, has a trademark name of "the Yoga Guy." He led the class in breathing and stretching exercises designed to achieve relaxation, followed by "positive affirmation[s]" such as "I am happy, I am good." He received a small stipend from School District funds for his time and travel.

Jon DiNozzi, on request, was allowed to opt out of the yoga exercises. Krystal DiBari testified that she was told that if she did not attend the yoga exercise class, she would be recorded as having cut class and would be ordered to serve detention; but she conceded that, although she did not attend, she did not in fact receive either penalty.

Plaintiffs contended that use of a Sikh priest to conduct such exercises on school premises constituted an endorsement of Eastern religions.

3. *Buddha*

Reizes testified that she read to her third or fourth grade class a story about the life of Buddha. Plaintiffs contended that reading that story to young children had the effect of promoting Buddhism, and that because, they assumed, reading about the life of Jesus Christ would not be permissible, reading about the life of Buddha should likewise be impermissible.

4. *Quetzalcoatl*

A teacher at Pound Ridge Elementary, as part of a historical presentation on Mexico, read her fifth-grade class a story about the Aztec bird god Quetzalcoatl. Some students were instructed to make an image of Quetzalcoatl out of cardboard, paper, and pipe cleaners. Students were also told that some persons believe that Quetzalcoatl will return to the world in the year 2012.

Plaintiffs contended that the study of Aztec religion, to the exclusion of the Christianity subsequently practiced by the majority of Mexicans, constituted a violation of the Establishment Clause, and that instructing students to create a depiction of Quetzalcoatl violated the Free Exercise Clause as well.

5. *"God Messed Up" and Other Poems*

Another teacher at Pound Ridge Elementary gave her fourth-grade students the assignment of writing poems on topics of their choice. Thereafter, a collection of 32 of the poems, selected by the students, was published as a booklet entitled "Poetry by 4H." Most of the poems concerned such commonplace topics as flowers, telephones, and dogs. Another, about a "fatman," read:

> There once was a fatman
> Who lived in a trash can
> Who outran Pac Man
> All the way to Spokane.

Plaintiffs complained, however, of the inclusion of two poems about God. One read

> GOD Messed Up....
> When he made cats
> He gave them the brains of bats
> With bloated legs
> And pointy ears.
> And some claws
> Made of SPEARS.

Another, entitled "Mess Up," read

> God messed up when he made dogs
> He gave them the brains of frogs. (tiny)
> He gave them deformed bodies and

Really shrimpy legs and hands
And bushy tails and butts, P.U
Guess what, he messed up on frogs, too.

Plaintiffs contended that the inclusion of these two poems contradicted Catholic teaching that God is omniscient and omnipotent, and hence violated the neutrality required by the Establishment Clause.

6. *The "DARE" Program*

The Drug Abuse Resistance Education ("DARE") Program is a nationwide, copyrighted educational program designed to teach public and parochial students to avoid drug abuse and violence. Trained police officers taught the DARE curriculum in the Bedford public schools. DARE teachings included several lessons that portrayed students in a variety of roles in which they might be lured into abusing drugs or committing violence. Students were provided with advice and instructions about approaches to avoiding such temptations. The program included a "DARE box," in which children could place questions—anonymously if they wished—that they were hesitant to ask in class. The DARE program did not include an instruction as to the morality of drug use; it did instruct that possession and use of unlawful substances is illegal.

Plaintiffs' expert witness, psychologist Dr. William R. Coulson, testified that the DARE program constituted "nondirective psychotherapy"—that is, the encouragement of the expression of attitudes and feelings deriving from the

"inner sel[f]," with the goal of spontaneously producing insightful understanding, without the need for a "wise man" to give instruction. Coulson testified that DARE had this effect because it encouraged students, in Coulson's words, to "get ... in touch with their deeper feelings about using drugs" even if they had never had occasion to consider using drugs in the first place. Plaintiffs contended principally that the DARE program violated the Free Exercise Clause, the Fourteenth Amendment right to privacy, and § 2504 of the New York Public Health Law, which prohibits the provision of health services without prior parental consent.

7. *Brain Stimulation Exercises*

In 1995, Reverend Nancy Weber, a self-described psychic and minister in the Life Spirit Congregational Church, taught exercises in creativity, learning, and memory at Pound Ridge Elementary. She received a modest stipend to compensate her for her time and travel. Her activities at the school included playing music, conducting breathing exercises, and leading drawing exercises with the nondominant hand, designed to stimulate the brain, in particular its nondominant hemisphere. Weber did not mention her ministry when she spoke with the students.

Plaintiffs contended that attempting to stimulate the brain's nondominant hemisphere promoted New Age religion, was antithetical to Catholic belief, and violated the Establishment and Free Exercise Clauses and their rights to privacy.

8. *Peer Facilitator Program*

The Peer Facilitator Program at Fox Lane High brought juniors and seniors in contact with ninth graders starting high school in an attempt to orient the new students and help them adjust to high-school life. Topics discussed with peer facilitators ranged from academic issues regarding classes and teachers to social issues such as how to avoid succumbing to peer pressure with regard to sex, drugs, and alcohol. Peer Facilitator Program materials included hypothetical questions for students to answer, such as imagining what they would do if they suddenly changed gender, or how their conduct and perspective would change if they were told they had only one year to live. In general, teachers were not present at Peer Facilitator Program meetings.

Plaintiffs contended that the Peer Facilitator Program constituted "amateur psychotherapeutic sessions," violating principally the First and Fourteenth Amendments and § 2504 of the New York Public Health Law.

9. *Meditation Exercises*

In various classes at Pound Ridge Elementary and Fox Lane Middle, students were exposed to meditation exercises in which classroom lights were turned off and students were asked to imagine themselves in a strange place, or to imagine that their bodies were filling with blue liquid, and to attempt to empty their minds. Plaintiffs contended that these exercises principally violated the First and Fourteenth

Amendments and § 2504 of the New York Public Health Law.

10. *The Ropes Challenge*

The Ropes Challenge was a physical challenge course at Fox Lane High designed to promote leadership skills and teamwork in outdoor activities. Older students helped lead the course. Activities included a wide variety of exercises in which students climbed over or through obstacles or transported themselves and each other by means of ropes or logs, in all cases working together in order to achieve a common goal. Plaintiffs' expert witness, Dr. Coulson, testified at trial that this program was "an elaborate exercise in non-directive psychotherapy ... using group encounter therapeutic techniques."

11. *Other Activities*

Plaintiffs also challenged a variety of other activities, from which they sought to secure a right of opt-out. Those activities included

--The Yale Decision Making Program at Fox Lane Middle, which included lessons on stress and stress management, as well as a relaxation exercise, in an effort to help students learn how to make productive and informed choices.

--The Myers Briggs Personality Test, a multiple-choice examination used to assess personality types, administered to students at Fox Lane High.

--Psychological counseling at Fox Lane High by a social worker on a variety of issues, occasionally including suicide counseling.

--A homework assignment to Pound Ridge Elementary students to keep a journal on their observations of their daily lives and family members. The teacher gave instructions as to how to prevent others from reading portions the student did not want to share.

D. *The District Court's Findings of Fact and Conclusions of Law*

In a decision issued on May 21, 1999, the district court found that "[s]ome of the conduct complained of does not seem to have religious overtones, but much of it does." 45 F.Supp.2d at 372. Noting that the basic thrust of the First Amendment's Establishment Clause is "one of government neutrality towards religion," *Id.* at 375, the court discussed United States Supreme Court cases addressing First Amendment issues, and concluded that "[b]ecause this case affect[ed] elementary and secondary public school children of young and impressionable age," 45 F.Supp.2d at 377, the appropriate test was the coercion test set out in *Lee v. Weisman*, 505 U.S. 577, 587, 591, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). In Lee, the Supreme Court stated that "at a minimum, the Constitution guarantees that government may not coerce anyone to ... participate in religion or its exercise," 505 U.S. at 587, 112 S.Ct. 2649. The district court stated that with respect to young persons, "[e]ven a subtle coercive pressure by a

government official to engage in religious activity may violate the First Amendment." 45 F.Supp.2d at 376 (internal quotation marks omitted).

With respect to the Free Exercise Clause, the court stated that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 378. Hence, "the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.' " *Id.* at 378-79 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)). "The government may not compel affirmation of religious belief," or "punish the expression of religious doctrines it believes to be false," or "impose special disabilities on the basis of religious views or religious status." 45 F.Supp.2d at 379. In order to establish a free exercise claim, " 'it is necessary ... for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.' " *Id.* (quoting *School District of Abington v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). Such coercion "can be either direct or indirect." 45 F.Supp.2d at 379.

The court described the issues in the present case as "the students' right[s] to exercise their own religious beliefs free from state coercion, as well as the right[s] of the parents to control the religious upbringing and training of their minor children." *Id.* In order to prevail on a given claim, plaintiffs were required to show that coercion "infringe[d] on the Plaintiff's ability to receive an 'important benefit' from the state at the expense of the

Plaintiff's right to the free exercise [of] his or her religion." *Id.* Applying the above principles, the court found, to the extent pertinent to these appeals, that aspects of the programs involving Ganesha, worry dolls, Earth Day, and "Listening to Nature," described in Part I.B. above, violated plaintiffs' Establishment Clause and Free Exercise Clause rights, and that the other challenged activities were not impermissible.

1. *Ganesha, Worry Dolls, Earth Day, and the Nature Tape*

The court found that the Pound Ridge Elementary lessons about Ganesha were largely permissible, but that the classes violated plaintiffs' First Amendment rights to the extent that they required the students to create images of the Hindu god:

> Mrs. Reizes' only purpose in teaching about Ganesha was to educate her students about the Indian culture and society. Although Lord Ganesha is a deity of the modern Hindu religion worshiped by hundreds of millions of people, reading a story common to the Indian culture, as part of an innovative, structured lesson plan about a foreign country and its culture, does not have the purpose or effect of advancing or inhibiting religion.... Considering the relative amount of time that Mrs. Reizes spent on reading the Ganesha story, this challenged activity should be seen as neither advancing or promoting the Hindu religion, but simply educating students about the Indian

> culture.... Likewise, in the context in which the story was read, the Court finds no indicia of any subtle coercive pressure to engage in the Hindu religion.
>
> This subtle coercive pressure is found, however, in the classroom projects of constructing images of Ganesha. It is merely fortuitous that the third grade students never actually made the clay images of Ganesha, as instructed, because they ran out of time. While reading the Ganesha story can be part of a neutral secular curriculum, this Court fails to find any educational justification for telling young impressionable students to construct images of a known religious god. This part of the lesson, however benign in purpose or intent, has the appearance to a child of that age that the school is communicating a message endorsing Lord Ganesha and the Hindu religion. Equally impermissible under the First Amendment is the subtle coercive pressure of instructing young impressionable students to make images of a god other than their own in violation of their religious beliefs....

45 F.Supp.2d at 383-84.

The court found that the sponsorship of worry dolls at Pound Ridge Elementary, either "by selling them in the school store, or encouraging students to make them in class or in the discovery center, and use them for relief from worry," was unconstitutional because "[i]t prefers

superstition over religion." *Id.* at 385. The court found that this activity was a rank example of teaching superstition to children of a young and impressionable age. It assumes that an inanimate object has some occult power to relieve us from worry and assure a good night's sleep. Father Pacwa testified, without contradiction, ... that the use of charms is forbidden by scripture and is an offense against the First Commandment. As Father Pacwa testified, "[t]he recent Catholic Catechism ... [prohibits] all forms of divination, magic and sorcery." *Id.*

The court found the Earth Day ceremonies at Fox Lane High violated the First Amendment because "[t]he worship of the Earth is a recognized religion (Gaia), which has been and is now current throughout the world." *Id.* at 393. The Court found that "[t]he liturgy of Earth Day at Fox Lane High School ... evolved into a proceeding which takes on much of the attributes of the ceremonies of worship by organized religions" and which was in many respects "truly bizarre." *Id.* The court stated that Saltzman's statement that all humans came from the Earth and will one day return to it was "clearly religious teaching" that echoed *Genesis* 3:19; and the court stated that his comment regarding the Earth's overpopulation and the need to combat it was "directly contrary to the teaching of *Genesis I.*" *Id.* at 394.

> To state this unproven fact as an absolute ... involved the school district in teaching a doctrine directly contrary to the views of Roman Catholic students and many others.

> As Father Pacwa pointed out, "the implication would be that you would have to use some sort of birth control to stop this. Also it takes a stance, a moral stance, on what is the problem of the world today, namely, too many people, instead of dealing with other moral issues of more political nature that prevent food from getting to people that need it."

Id.

The district court also found that playing the "Listening to Nature" tape at Fox Lane Middle promoted "a creed worshiping the Earth." *Id.* Implicitly rejecting Funari's belief that, because she lowered the volume, her students could not hear the prayers on the tape, the court found that the playing of the tape constituted a "direct presentation to the children of an Earth-centered religious belief." *Id.* at 395. Describing the tape's "essential thrust" as the "promotion of Earth worship and prayer to the Earth," the court held that its playing to students "offend[ed] both aspects of [the religion clauses of] the First Amendment." *Id.*

2. *Other Challenged Activities*

The court dismissed plaintiffs' challenges to other activities, including those described in Part I.C. above, finding that those activities were nonreligious in nature and did not violate any of plaintiffs' rights under the First or Fourteenth Amendments or under state law.

As to Magic, or MTG, the court found that "[n]o reasonable person could regard sponsoring this game as a teaching of religion." 45 F.Supp.2d at 381. It stated that

> [a]s the game itself is not religious in nature, Plaintiffs' argument that the Defendants by allowing this extracurricular activity are advancing or promoting Satanism as a religion or the occult also fails. Furthermore, since participation was voluntary and permitted only with written parental consent, and not during school hours, this Court finds that the school district neither asserted coercive pressure for students to participate in the game, nor did it infringe on plaintiffs' right to the free exercise of their religion.
>
> Assuming, solely for the argument, that Magic: "The Gathering" was religious in nature, the evidence shows, and the Court finds, that no reasonable observer or participant could believe that the school district's actions communicated a message of endorsement of the beliefs, if any, contained within the game. To the contrary, the school district's precautions to present the club as a mere extracurricular activity not endorsed by the school, but simply offered on school grounds not during school hours, is consistent with the Supreme Court's decisions on the interplay between the competing principles of Free Speech, Free Exercise, and

> Establishment clauses of the First Amendment.

Id. at 381-82.

The court also found that the yoga exercises did not violate the constitution because "although the presenter was dressed in a turban and wore the beard of a Sikh minister, he did not in his yoga exercise presentation advance any religious concepts or ideas." *Id.* at 385. Similarly, the court found that the brain stimulation exercises did not violate the constitution because plaintiffs failed to produce any "evidence that Rev. Weber, during her brief visit to the school, taught any religion or performed intuitive counseling, exercised her psychic powers or engaged in telepathy." *Id.* at 392. Thus, the court noted that although "[t]he entire Nancy Weber lecture may well have been nothing but humbug," Weber had not "required the students to engage in a 'bogus mystical experience' as charged," and the court "conclude[d] that on the totality of the evidence [the brain stimulation exercises] did not rise to the level of a First Amendment violation." *Id.*

Nor did the court see any constitutional violation in the studies of the lives of Buddha and Quetzalcoatl. It found no evidence that the Buddha reading was "conducted in such a fashion as to sponsor belief in Buddha or to violate the First Amendment rights of Plaintiffs." *Id.* at 387. It likewise found that the study of Quetzalcoatl did not promote belief in Quetzalcoatl and that no student was

compelled to create a physical likeness of Quetzalcoatl. *See Id.* The court also noted that "[u]nlike Lord Ganesha, Quetzalcoatl is not currently worshiped in the world and [that] hanging the Quetzal Bird in class should not be regarded as the adoption of a religious symbol." *Id.* Although students were informed that "some persons believe Quetzalcoatl will return to the world in the year 2012," the court noted that "telling students 'some persons believe' is not the same as sponsoring that idea in the minds of the children." *Id.*

As to the "God Messed Up" poems, the district court rejected plaintiffs' contention that the poetry writing program violated the neutrality required by the Establishment Clause. The court noted that

> [t]he reasonable person or child reading the book of poems would assume that the authors meant it to be funny. The inclusion of these poems on a subject not dictated by the teacher does not constitute the endorsement of an anti- religious message, and indeed it is not certain that the message is intended to be anti-religious. The poetry may have been inspired by "Ma and God," a poem for children written by Shel Silverstein (deceased May 10, 1999), a distinguished humorous poet for children writing in the tradition of A.A. Milne.

Id. at 388. The Silverstein poem, introduced by plaintiffs at trial, reads as follows:

MA AND GOD
God gave us fingers--Ma says, "Use your fork."
God gave us voices--Ma says, "Don't scream."
Ma says eat broccoli, cereal and carrots.
But God gave us tasteys [*sic*] for maple ice cream.
God gave us fingers--Ma says, "Use your hanky."
God gave us puddles--Ma says, "Don't splash."
Ma says, "Be quiet, your father is sleeping."
But God gave us garbage can covers to crash.
God gave us fingers--Ma says, "Put your gloves on."
God gave us raindrops--Ma says, "Don't get wet."
Ma says be careful, and don't get too near to
Those strange lovely dogs that God gave us to pet.
God gave us fingers--Ma says, "Go wash 'em."
But God gave us coal bins and nice dirty bodies.
And I ain't too smart, but there's one thing for certain--
Either Ma's wrong or else God is.

S. Silverstein, *Where the Sidewalk Ends* 119 (1974). The district court found that Silverstein too was

> apparently intending to be funny. Without endorsing any of the poetry, the Court does not perceive that this evidence arises to the level of a promotion or disparagement of a religious concept.... No First Amendment violation is found....

45 F.Supp.2d at 388 (footnote omitted).

Similarly, the court found no religious significance in the other programs described in Part I.C. above, such as DARE, the Peer Facilitator Program, and meditation exercises, nor any cognizable violation of state law. It found, for example, that

> [t]he DARE Program is relatively free of moral overtones, contains no religious emphasis whatsoever, and leaves the "decision" whether or not to use tobacco, alcohol or drugs to the student after evaluating both positive and negative effects.

Id. at 390.

Finally, the court held that the various claimed invasions of family privacy did not violate any constitutional or statutory provision. Citing *Immediato v. Rye Neck School District*, 73 F.3d 454, 462 (2d Cir.) ("Immediato"), *cert. denied*, 519 U.S. 813, 117 S.Ct. 60, 136 L.Ed.2d 22 (1996), the district court stated that an activity that is alleged to violate

> the claimed right of a parent to direct the upbringing of his or her children ... [is to] be analyzed only under the minimal rational basis standard of review. Thus, the defendants need only prove that the activities at issue are based on a legitimate state interest and that the activities are rationally related to furtherance of that objective.

45 F.Supp.2d at 396. The court further noted that Immediato recognized that the state has a "'compelling' interest in educating its youth, to prepare them to participate effectively and intelligently in our open political system, and to be self-reliant and self-sufficient participants in society." 45 F.Supp.2d at 396 (quoting *Immediato*, 73 F.3d at 461). Finding that the journal assignments, "although intrusive in nature, do further the state's compelling objective of education," the court held that they did not constitute a violation of the Fourteenth Amendment. 45 F.Supp.2d at 396.

E. *Denial of Bedford's Motion To Dismiss Challenges to the Pound Ridge Elementary Activities for Loss of Standing*

After the district court's decision and prior to the entry of judgment, the parties brought to the district court's attention two changes that had occurred or were about to occur in the residence of the plaintiff families. First, Bedford informed the court that it had just learned that in March 1998, the Altman family had moved to Connecticut. Since Ross Altman was the only plaintiff who at the time of trial in 1999 was young enough to attend elementary school, and he and his family had by that time moved out of the School District, Bedford moved to dismiss all claims challenging activities at Pound Ridge Elementary on the ground of lack of subject matter jurisdiction because no plaintiff any longer had standing to challenge those activities.

In addition, in mid-July 1999, Cecile D. DiNozzi filed an affidavit with the district court, stating that on July 24, 1999, she and her family would be relocating to Delaware.

In a Memorandum and Order dated July 23, 1999 ("Standing Opinion"), the district court denied Bedford's motion. The court noted that because the Altman family no longer resided within the district as of March 1998, and the departure of the DiNozzi family was imminent, the only plaintiffs who might have standing were Mary Ann DiBari and her grandchildren. The DiBari grandchildren were beyond elementary-school age by time of trial; but the court concluded that "[a] municipal taxpayer such as Ms. DiBari has standing to complain about Free Exercise *or* Establishment Clause violations accomplished in a school within the municipality by its paid employees." Standing Opinion at 5 (emphasis in original).

> Ms. DiBari is still a taxpayer within the defendant Bedford Central School District, and thus responsible for the funding of the education of her two grandchildren who are still enrolled in schools within the defendant district, as well as funding the general budget for general school district expenses. The Court also notes that the final injunction granted to the plaintiffs is to be enforced district-wide and is not limited to the specific school where the challenged activity occurred initially. As a taxpayer, Ms. DiBari continues to have a personal stake in the outcome of this litigation.... This Court's decision after trial in this case is explicit that the defendant district has

> engaged in conduct that violated the Establishment Clause of the First Amendment of the Constitution.The record is clear that unless prevented by the court, the activities will continue in the future. Public money supported that conduct and those who engaged in it. Actions of the school district are funded, in large part, by local real property taxes. Accordingly, the Court maintains subject matter jurisdiction over this case by reason of the municipal taxpayer standing of plaintiff Mary Ann DiBari as well as her status as legal guardian of her two grandchildren.

Id. at 3-4.

F. *The Final Judgment*

On July 23, 1999, the court entered its final judgment, holding, to the extent pertinent to Bedford's appeal, that activities with respect to Earth Day ceremonies, nature worship, worry dolls, and Ganesha image construction activities on school premises violated plaintiffs' rights under the Establishment and Free Exercise Clauses of the First Amendment. To the extent pertinent to the cross-appeal, the court dismissed all of plaintiffs' challenges to other activities.

The court entered an injunction containing mandatory and prohibitory provisions. It ordered Bedford to

adopt and publish guidelines to teachers and others to insure that they will abide by the Supreme Court's standards set forth in the cases quoted in this Court's Order and Opinion, so as to avoid coercing any student to participate in religion or its exercise or to violate any religious precept held by a child or his or her parents, and to further avoid sponsoring or disparaging religious beliefs held by students and or their parents.

Final Judgment and Permanent Injunction at 2. It enjoined and restrained Bedford and most of the named individual defendants

A. From sponsoring worship of the Earth or presentation of a liturgy addressed to the Earth as if it were a creator or divine, including any symbolic presentation of gifts to the Earth, the erection of "symbolic structures" equal to an altar, a chorus of ceremonial drums, or any globe on bamboo sticks or other totem serving as a focal point of the worship service, or any religious teaching in connection therewith;

B. From sponsoring prayers to the Earth or any creed of worshiping the Earth by means of audio tape or otherwise;

C. From sponsoring, instructing or encouraging the fashioning of charms in the form of so-called "worry dolls" by students in the Discovery Center at Pound

> Ridge Elementary School or elsewhere in the District, the sale of said charms in any school store, or from instructing or suggesting to students through school personnel or otherwise that said charms have supernatural powers to "chase away your bad dreams," "take away all our worries," or any other supernatural or occult power;
>
> D. From directing or encouraging students to make likenesses or images of the Hindu god, Lord Ganesha, or any other god.

Id. at 3-4. The judgment also granted plaintiffs attorneys' fees and disbursements totaling $106,856.61.

G. *The Present Appeals*

The School District has appealed, contending principally that the injunction and the rulings that the School District violated plaintiffs' rights should be vacated. Plaintiffs have cross-appealed, contending that the district court erred in dismissing their challenges to the activities described in Part I.C. For the reasons that follow, we conclude principally that the district court should have dismissed for lack of subject matter jurisdiction, because of mootness, plaintiffs' challenges to any activities that were not found to have occurred at schools other than Pound Ridge Elementary; that the challenges to the activities at Fox Lane Middle likewise became moot after the entry of judgment and must also be dismissed; that the court erred in ruling that plaintiffs' First Amendment rights were

violated; and that the district court's dismissals of plaintiffs' nonmoot claims were correct.

II. SUBJECT MATTER JURISDICTION

We turn first to Bedford's challenge to the denial of its posttrial motion to dismiss, for lack of jurisdiction due to plaintiffs' loss of standing, all challenges to activities at Pound Ridge Elementary, and to the matter of whether challenges to the activities at Fox Lane Middle also have become moot.

A. *Standing and Mootness*

The Constitution limits the jurisdiction of Article III courts to matters that present actual cases or controversies. *See* U.S. Const. art. III, § 2, cl. 1. This limitation means that when a plaintiff brings suit in federal court, she must have standing to pursue the asserted claims. It also generally means that if the plaintiff loses standing at any time during the pendency of the proceedings in the district court or in the appellate courts, the matter becomes moot, and the court loses jurisdiction. *See generally Church of Scientology of California v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) ("It has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (internal quotation marks omitted)).

In order to have standing to bring suit, a plaintiff must allege "injury in fact" to his or her preexisting, legally protected interest; such injury must be "(a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted). Particularized "mean[s] that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n. 1, 112 S.Ct. 2130. A plaintiff " 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). The rare exceptions to this rule generally involve situations in which the plaintiff has a close relation with the third party and "there exists some hindrance to the third party's ability to protect his or her own interests." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). Parents generally have standing to assert the claims of their minor children. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 423, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 841 n. 44, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

At issue here is the mootness doctrine, for "[t]he usual rule in federal cases is that an actual controversy must exist

at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). "While the standing doctrine evaluates [a litigant's] personal stake as of the outset of the litigation, the mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit ... including the pendency of the appeal." *Cook v. Colgate*, 992 F.2d 17, 19 (2d Cir.1993). Thus, even as to claims that plaintiffs originally had standing to assert, the court must determine whether those claims remain live controversies or have become moot.

" 'A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.' " *Freedom Party of New York v. New York State Board of Elections*, 77 F.3d 660, 662 (2d Cir.1996) (quoting *New York City Employees' Retirement System v. Dole Food Co.*, 969 F.2d 1430, 1433 (2d Cir.1992) (internal quotation marks omitted)). In *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), for example, the plaintiffs challenged a state statute providing for the reading, without comment, of five verses of the Old Testament at the opening of each public-school; one of the plaintiffs asserted standing on the ground, *inter alia*, that his daughter was a public-school student. The Supreme Court rejected that ground, however, noting that the daughter "had graduated from the public schools before th[e] appeal was taken to th[e Supreme] Court," *Id.* at 432, 72 S.Ct. 394, and stating that "[o]bviously no decision we could render now would

protect any rights she may once have had [;] ... this Court does not sit to decide arguments after events have put them to rest," *Id.* at 432-33, 72 S.Ct. 394.

If a claim has become moot prior to the entry of final judgment, the district court generally should dismiss the claim for lack of jurisdiction. *See, e.g., Campbell v. Greisberger*, 80 F.3d 703, 705 (2d Cir.1996) (affirming mootness dismissal). Similarly, if a claim becomes moot between the entry of final judgment and the completion of appellate review, the appellate court usually must either dismiss the appeal, *see, e.g., Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72-73, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983) (per curiam); *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 94 F.3d 96, 100 (2d Cir.1996), or vacate so much of the district court's judgment as adjudicated that claim and remand for entry of a judgment dismissing that claim, *see, e.g., Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-94, 99 S.Ct. 2149, 60 L.Ed.2d 735 (1979) (per curiam); *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73-74 (2d Cir.1991). *But see Karcher v. May*, 484 U.S. 72, 82-83, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987) (appellate court should not vacate the judgment below if the case has become moot due to the voluntary act of the losing party); *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 383 (2d Cir.1993) (same).

A narrow exception to the principle that a moot claim is to be dismissed, available "only in exceptional situations," *City of Los Angeles v. Lyons*, 461 U.S. 95,

109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), is that the court may adjudicate a claim that, though technically moot, is "capable of repetition, yet evading review," *Id.* at 109, 103 S.Ct. 1660; *see Weinstein v. Bradford*, 423 U.S. 147, 148-49, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975) (per curiam). That exception is not applicable, however, unless the repetition would affect the "same complaining party." *Id.* at 149, 96 S.Ct. 347; *see, e.g., Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 94 F.3d at 100-01; *Video Tutorial Services, Inc. v. MCI Telecommunications Corp.*, 79 F.3d 3, 6 (2d Cir.1996) (per curiam). Thus, in the absence of a class action, the "capable of repetition, yet evading review" exception is not available when the issue is students' rights and the complaining students have graduated from the defendant institution. *See, e.g., Board of School Commissioners of Indianapolis v. Jacobs*, 420 U.S. 128, 129-30, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975) (per curiam) (dismissing as moot a challenge by high-school students to regulation of their school newspaper, after the Court learned at oral argument that all plaintiffs had graduated); *Fox v. Board of Trustees*, 42 F.3d 135, 140 (2d Cir.1994) (pursuit of First Amendment challenge to regulation barring private commercial businesses from conducting sales demonstrations in students' dormitory rooms mooted by complaining students' graduation), *cert. denied*, 515 U.S. 1169, 115 S.Ct. 2634, 132 L.Ed.2d 873 (1995); *Cook v. Colgate*, 992 F.2d at 19 (gender discrimination claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688, mooted by graduation of student members of women's ice hockey team).

B. *Standing To Assert First Amendment Claims*

To have standing to pursue a claimed violation of the Free Exercise Clause, a plaintiff must allege that her own "particular religious freedoms are infringed." *School District of Abington v. Schempp*, 374 U.S. at 224 n. 9, 83 S.Ct. 1560. For example, in *McGowan v. Marlyand*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), the plaintiff businessmen were held not to have standing to bring a Free Exercise Clause challenge to Sunday closing laws based on "only economic injury to themselves," without an "alleg[ation of] any infringement of their own religious freedoms due to Sunday closing," *Id.* at 429, 81 S.Ct. 1101. Likewise, in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784, *reh'g denied,* 448 U.S. 917, 101 S.Ct. 39, 65 L.Ed.2d 1180 (1980), indigent pregnant women were held not to have standing to challenge, under the Free Exercise Clause, a law that limited the use of federal funds to reimburse costs of abortions under the Medicaid program where no named plaintiff "alleged, much less proved, that she sought an abortion under compulsion of religious belief," *Id.* at 320, 100 S.Ct. 2671; *see also Id.* at 321, 100 S.Ct. 2671 (" '[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.' " (quoting Schempp, 374 U.S. at 223, 83 S.Ct. 1560)).

In contrast, "the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof

that particular religious freedoms are infringed." Schempp, 374 U.S. at 224 n. 9, 83 S.Ct. 1560. Thus, standing to assert an Establishment Clause claim may rest either on the plaintiff's direct exposure to the challenged activity, *see, e.g., Id.* (students attending a public school, and their parents, have standing to challenge a program of Bible reading in the school because they are "directly affected by the laws and practices against which their complaints are directed"), or, in certain situations, on the plaintiff's status as a taxpayer, *see, e.g., Flast v. Cohen*, 392 U.S. 83, 103-04, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Doremus v. Board of Education*, 342 U.S. at 433-35, 72 S.Ct. 394.

In *Doremus*, one of the plaintiffs asserting an Establishment Clause challenge to the public-school-Bible-reading practice claimed to have standing not only on the basis that he had a daughter subjected to the reading (a basis mooted by her graduation), but also on the basis that he was "a citizen and taxpayer of the Borough of Hawthorne in the State of New Jersey, ... that Hawthorne has a high school supported by public funds[, and that in] this school the Bible is read," *Id.* at 433, 72 S.Ct. 394. The Supreme Court rejected taxpayer status as a basis for standing, however, because the Doremus grievance was not that the plaintiffs were taxed a measurable amount of money but rather that they objected to the practice on religious grounds. The Court stated that

> [t]here is no allegation that this activity is supported by any separate tax or paid for from any particular

> appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and *there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it.*

Id. at 433, 72 S.Ct. 394 (emphasis added). The Court reiterated the view it had stated in *Com. of Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), commonly known as *Frothingham v. Mellon*, that

> "[t]he party who invokes the power must be able to show, not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Doremus, 342 U.S. at 434, 72 S.Ct. 394 (quoting Mellon, 262 U.S. at 488, 43 S.Ct. 597). The *Doremus* Court distinguished *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), in which it had found a justiciable controversy, because Everson "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." *Doremus*, 342 U.S. at 434, 72 S.Ct. 394. The *Doremus* Court stated that

> [t]he taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. *It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference.* If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. *It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here.* If the Act may give rise to a legal case or controversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation.

Id. at 434-35, 72 S.Ct. 394 (emphases added).

This Court, in addressing the question of a municipal taxpayer's standing to challenge municipal activities, has stated that although that standing does not depend on the plaintiff's ability to show a "likelihood that resulting savings will inure to the benefit of the taxpayer," *United States v. City of New York*, 972 F.2d 464, 466 (2d Cir.1992), "under Frothingham we presume a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the challenged activity involves a measurable appropriation or loss of revenue," *Id.* at 470 (internal quotation marks omitted). *See also Board of Education v.*

New York State Teachers Retirement System, 60 F.3d 106, 110-11 (2d Cir.1995) (municipal taxpayer standing requires ability to identify a "measurable appropriation or loss of revenue" attributable to the challenged activities (internal quotation marks omitted)).

C. *The Present Case*

These principles affect federal jurisdiction with respect to plaintiffs' challenges to activities at both Pound Ridge Elementary and Fox Lane Middle. When this action was commenced, at least one plaintiff was eligible to attend Pound Ridge Elementary, at least one was attending or eligible to attend Fox Lane Middle, and at least one was attending or eligible to attend Fox Lane High. When the case was tried in 1999, however, Ross Altman was the only plaintiff who was not beyond elementary-school age; and he and his family had previously moved out of the School District, relocating to the State of Connecticut. Thus, by the time of trial, no plaintiff could claim any direct injury from activities conducted at Pound Ridge Elementary. Accordingly, plaintiffs' Free Exercise Clause challenges to those activities should have been dismissed for lack of jurisdiction because they had become moot. Although the district court ruled that the challenges to activities at that school were not moot because Mary Ann DiBari had standing as a municipal taxpayer, that ruling was error as to claims under the Free Exercise Clause because none of the DiBaris could meet the requirement that they assert violations of their own particular religious freedoms.

For similar reasons, plaintiffs' Free Exercise Clause challenges to activities at Fox Lane Middle became moot prior to this appeal. At the time of trial, Krystal DiBari was already a high-school student; the only plaintiff attending Fox Lane Middle was Tiana DiBari. Tiana graduated from Fox Lane Middle in 1999. And although one or more of the DiNozzi children remained age-eligible to attend that school, the DiNozzi family relocated to Delaware on July 24, 1999, the day after judgment was entered in the district court. Thus, these events have left no plaintiff who, during this appeal, can show that activities at Fox Lane Middle infringe his or her own particular religious freedoms. Accordingly, the Free Exercise Clause challenges to activities at Fox Lane Middle too must be dismissed for lack of jurisdiction.

Although standing to assert claims under the Establishment Clause may rest instead on a showing of taxpayer injury, we conclude that the moves of the Altman and DiNozzi families out of the School District and the graduation of Tiana DiBari from Fox Lane Middle also mooted plaintiffs' Establishment Clause challenges to activities at Pound Ridge Elementary and Fox Lane Middle, for we disagree with the district court's conclusion that Mary Ann DiBari had taxpayer standing. In reaching its conclusion, the district court stated that "[p]ublic money supported [the challenged] conduct and those who engaged in it," Standing Opinion at 4, and that taxpayers are responsible for "funding the general budget for general school district expenses," *Id.* at 3. Such general findings, however, are not sufficient; what was required for the

establishment of taxpayer standing to complain of activities at Pound Ridge Elementary or Fox Lane Middle was a showing of a measurable appropriation or loss of revenue attributable to the challenged activities at those schools. We see no indication that such a showing was made. We have seen no evidence, for example, that purchases of crayons, clay, or construction paper were made solely for the activities that plaintiffs challenged. The only expenditure adverted to by the district court with respect to either of those schools was a "modest stipend," 45 F.Supp. at 392 n. 17, to Weber for the brain stimulation session, which consisted of music, breathing exercises, and drawing exercises with the nondominant hand--all found to be unrelated to religion. The court described the Weber venture as but a "brief visit," *Id.* at 392, did not specify the "modest" amount she received, and made no finding that there was any measurable appropriation to fund her visit.

We also reject the district court's view that a municipal taxpayer has standing to complain of school activities within the municipality simply because they are conducted "by its paid employees," Standing Opinion at 5. Nearly all governmental activities are conducted or overseen by employees whose salaries are funded by tax dollars. To confer taxpayer standing on such a basis would allow any municipal taxpayer to challenge virtually any governmental action at any time. Article III, as interpreted by the Supreme Court, requires a good deal more.

In sum, we conclude that the Altmans and the DiNozzis no longer have standing to pursue any of the claims asserted in this action; that the DiBaris did not have standing at the time of trial to challenge activities conducted at Pound Ridge Elementary; and that when Tiana DiBari graduated from Fox Lane Middle, the DiBaris lost their standing to challenge activities conducted at that school. The DiBaris thus retain standing to challenge only the activities at Fox Lane High.

Of the activities that the district court found unconstitutional, those regarding Ganesha and worry dolls were not found to have taken place at any school other than Pound Ridge Elementary; the "Listening to Nature" tape was not found to have been played at any school other than Fox Lane Middle. Because no plaintiff retains standing to challenge the activities at those schools, claims with respect to those activities must be dismissed as moot.

Other challenged activities conducted at Pound Ridge Elementary and/or Fox Lane Middle, but not found to have taken place at Fox Lane High, included those with regard to Buddha, Quetzalcoatl, the "God Messed Up" poems, brain stimulation exercises, the writing of descriptive journals, Magic, meditation, and the Yale decision-making program. The district court dismissed all claims challenging these activities for lack of merit. All of them are moot and hence dismissable for lack of jurisdiction, and we reject on that basis plaintiffs' cross-appeal seeking their reinstatement.

III. THE MERITS OF THE SURVIVING SUBSTANTIVE CHALLENGES

Given our rulings in Part II above, only challenged activities at Fox Lane High remain at issue, and the only activity at that school that the district court found unconstitutional is the celebration of Earth Day.

A. *Earth Day and the Establishment Clause*

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend I. In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Supreme Court set out a three-pronged test that a governmental practice must meet in order to withstand a challenge under the Establishment Clause. The Lemon test requires that the practice (1) "have a secular legislative purpose," (2) have a "principal or primary effect ... that neither advances nor inhibits religion," and (3) "not foster an excessive government entanglement with religion." *Id.* at 612-13, 91 S.Ct. 2105 (internal quotation marks omitted). Only the first two prongs of this test are at issue in this case.

In applying the first Lemon prong, the Supreme Court has asked "whether government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (striking down Louisiana law that forbade the

teaching of evolution in public schools unless accompanied by teaching of creationism) (internal quotation marks omitted). "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.* at 584, 107 S.Ct. 2573.

In addressing the second Lemon prong, *i.e.*, the effect of the practice, in the context of a challenge to the display of a crèche in a county courthouse, *see County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), a majority of the Supreme Court applied the standard of whether a reasonable observer would find that the crèche had the effect of endorsing religion. *See Id.* at 620, 109 S.Ct. 3086 (opinion of Blackmun, J.); *Id.* at 635-36, 109 S.Ct. 3086 (O'Connor, J., concurring in part and concurring in the judgment); *Id.* at 642-43, 109 S.Ct. 3086 (Brennan, J., concurring in part and dissenting in part, joined by Marshall and Stevens, JJ.); *see, e.g., Agostini v. Felton*, 521 U.S. 203, 234-35, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (applying endorsement test, along with prongs of the Lemon test, to challenge of government aid to parochial schools). The reasonable-observer test is an objective standard, *see, e.g., Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir.1992), and we review its application *de novo*.

Further, under the Establishment Clause, " 'government may not coerce anyone to support or participate in religion or its exercise.' " *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)). In Lee, the Court held that delivery of a prayer by a rabbi at a middle-school commencement violated the Establishment Clause because of the risk that the young students might feel coerced to participate in the prayer. *See* 505 U.S. at 598-99, 112 S.Ct. 2649. The Court found "subtle coercive pressures" in the commencement prayer and in the fact that there was "no real alternative" for a student who wished "to avoid the fact or appearance of participation." *Id.* at 588, 112 S.Ct. 2649. In Doe, the Court held that even where a prayer before a high-school football game was delivered by a student who was elected by the student body, it "ha[d] the improper effect of coercing those present to participate in an act of religious worship." 530 U.S. at 312, 120 S.Ct. 2266.

Nonetheless, while "[s]chools have a constitutional duty to make 'certain ... that subsidized teachers do not inculcate religion,' " *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469, 475 (2d Cir.) (quoting Lemon, 403 U.S. at 619, 91 S.Ct. 2105), *cert. denied*, 528 U.S. 869, 120 S.Ct. 169, 145 L.Ed.2d 143 (1999), the Establishment Clause does not prohibit schools from teaching about religion. *See, e.g., Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 66 L.Ed.2d 199

(1980) (per curiam) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."). "[S]tudy of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition." *Epperson v. Arkansas*, 393 U.S. 97, 106, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *see Schempp*, 374 U.S. at 225, 83 S.Ct. 1560.

Finally, the Establishment Clause "'forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma.'" *Edwards v. Aguillard*, 482 U.S. at 593, 107 S.Ct. 2573 (quoting Epperson, 393 U.S. at 106-07, 89 S.Ct. 266) (emphases in Aguillard). Thus, on the one hand, the fact that a governmental action or message coincides with the beliefs of certain religions does not, without more, invalidate that action or message. *See McRae*, 448 U.S. at 318-20, 100 S.Ct. 2671 (ban on Medicaid funding of abortions does not violate Establishment Clause even though it coincides with Catholic doctrine); *McGowan*, 366 U.S. at 442-45, 81 S.Ct. 1101 (Sunday closing laws do not violate Establishment Clause even though they coincide with Christian doctrine); *Id.* at 442, 81 S.Ct. 1101 ("[M]urder is illegal[;] .... the fact that this agrees with the dictates of the Judaeo Christian religions while it may disagree with others does not invalidate the regulation."). On the other hand, the Establishment Clause does not prohibit teaching about a doctrine, such as evolution, merely because it

conflicts with the beliefs of a religious group. *See* Epperson, 393 U.S. at 109, 89 S.Ct. 266. In sum,

> [t]here is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles *or* prohibitions of any religious sect or dogma.

Id. at 106, 89 S.Ct. 266 (emphasis added).

In the present case, the district court concluded that the celebration of Earth Day at Fox Lane High constituted a religious ceremony because (a) "[t]he worship of the Earth is a recognized religion (Gaia), which has been and is now current throughout the world," 45 F.Supp.2d at 393, (b) the proceedings "t[ook] on much of the attributes of the ceremonies of worship by organized religions," *Id.*, and (c) the faculty advisor's statements paralleled one statement in *Genesis* (and hence was found to constitute "clearly religious teaching," *Id.* at 394), and contradicted another in a way that plaintiffs viewed as an endorsement of birth control, contrary to principles of Catholicism, *see Id.* Presumably the organized- religion ceremonial attributes referred to by the court were the actions prohibited in the court's final injunction, *e.g.*, use of " 'symbolic structures' equal to an altar," use of "any globe on bamboo sticks," and use of "a chorus of ceremonial drums." Final Judgment and Permanent Injunction at 3, § A. In light of the evidence and of the findings made, or not made, by the

district court, we have difficulty with the court's conclusion.

First, the court did not find that the School District sponsored Earth Day ceremonies with any intent to establish religion. Although plaintiffs' pleading alleged that there was a Bedford "program" to promote satanism and "New Age spirituality" (Amended and Supplemental Complaint § 18(a)) and the "*Veneration of Pagan Gods*" (*Id.* page 12 (italics in original)), the court found that there was no such "program," 45 F.Supp.2d at 373. As to the Earth Day ceremonies in particular, the court found that their sponsorship "started out innocently enough," *Id.* at 393, originating in the century-old provision of the New York State Education Law that there be an annual celebration of Conservation Day. That provision, quoted in full in Part I.B.3. above, requires public schools to "assemble the pupils ... in the school building, or elsewhere," to "conduct ... such exercises as shall tend to encourage the planting, protection and preservation of trees and shrubs," and to use "lectures, pictures or tours ... to increase the interest and knowledge of such pupils in the fish and wild life, soil and water of the state." N.Y. Educ. Law § 810(2).

Further, the district court did not find that the Earth Day program was coercive. And, for the reasons discussed in Part III.B. below, we agree that it was not. Given that the School District's sponsorship of Earth Day ceremonies had a secular purpose and was not coercive, the inquiry

becomes whether those ceremonies had the effect of endorsing the Gaia religion.

On this issue, we disagree with the district court, for we cannot conclude that an objective observer would view the Earth Day ceremonies as having a Gaia-endorsing effect. Although the district court stated that the Earth Day ceremonies involved "addresse[s] to the Earth as if it were the Creator, or divine," and "prayers ... to the Earth," 45 F.Supp.2d at 397, scant evidence was cited to support that finding. The "address" that comes closest to the court's description appears to be the Taos Indian invocation on the "Listening to Nature" tape, played at Fox Lane Middle, suggesting that the Earth was "Mother of us all," J. Cornell, *Listening to Nature, How to Deepen Your Awareness of Nature* at 64 ("The Mother of us all is Earth. / The Father is the Sun. / The Grandfather is the Creator / Who bathed us with his mind / And gave life to all things / ... We praise our Grandfather for his creation."). But there is no indication that that tape was played at any Earth Day ceremonies; and even that invocation describes "The Grandfather," not the Earth, as the Creator. The court did not cite evidence to support its statement that the Earth was designated the Creator, or as a Divine Being, or was worshiped at the School District's Earth Day ceremonies.

Further, we have seen in the trial testimony little or no probative mention of Gaia. For example, the student president of Youth in Action, which organized the Earth Day ceremonies, was asked if he had heard of Gaia; he

testified that he had, and that he understood it to be the belief that the Earth is a living thing. But he did not suggest that the Earth Day ceremonies were meant to represent rituals of Gaia or any other religion. Rather, he stated that the Earth Day activities were designed merely to help students understand environmental problems and to foster respect for the Earth, and that there was no worshiping of the Earth nor any religious significance in any of the components of the Earth Day celebration. Similarly, an issue of the Fox Lane High newspaper introduced by plaintiffs and relied on by the district court, while containing a reference to "Mother Earth," described Earth Day as a day whose celebration was special precisely because it was not religious. (*See The Forum* April 1997 ("*Forum* article") ("There are no barriers, such as religion or cultural differences, to hold us back in our realization of our relationship with the earth and all things around us. Although this may be one of the most important holidays of the year, many of us are still unsure of its meaning, probably because, unlike religious holidays, there are no strict ceremonies or interpretations of Earth Day; it is simply a celebration of the Earth.")). Thus, we see no greater religious significance in the article's colorful reference to "Mother Earth" in this context than if the article had referred to "Father Time."

The district court made no finding that anyone attending the ceremonies suggested that the Earth possessed supernatural powers or that it should be worshiped; nor have plaintiffs called to our attention any evidence of such a suggestion. The court pointed to two

remarks of the faculty advisor, one that was consistent with the teachings of *Genesis,* and one that was contrary to those teachings. But we cannot conclude that a reasonable observer would view either of those statements as having a Gaia-endorsing effect; Supreme Court precedent makes clear that the Establishment Clause is not transgressed merely because a statement either is in agreement with, or is in disagreement with, a given religious tenet.

Finally, we cannot conclude that the ceremonial acts that the district court pointed to and enjoined would be viewed by an objective observer as suggesting that the Earth was Divine, or the Creator, or a Being to be worshiped, or that the proceedings were in nature religious. For example, when the court enjoined the use of " 'symbolic structures' equal to an altar," it was quoting the 1997 *Forum* article; but the "symbolic structures" referred to in that article were not altar-like; the article stated that they were tepees. Nor has our attention been directed to any evidence that students were called upon to place any objects on a structure like an altar; rather, the testimony was that the proffered "gifts" were purely metaphorical, such as gifts of knowledge and wisdom in the form of speeches. Further, though the court enjoined the use of drum rolls during Earth Day ceremonies, drum rolls are commonly used in proceedings having no religious significance whatever. And although the display of a globe on bamboo poles is less common, the district court did not adequately explain why such display of a globe, or the roll of drums, had significance that was religious.

As the court noted, the faculty advisor's memorandum described the Earth Day ceremonies as reflecting "the core idea of respect for the earth...." 45 F.Supp.2d at 394. Respect, however, does not inevitably suggest religion. Indeed, the rituals employed in the Fox Lane High ceremonies, although more imaginative, strike us as not fundamentally different from rituals codified by Congress for showing respect to the United States flag. For example, Congress has instructed that when the flag is displayed during a rendition of the national anthem,

> (A) all present except those in uniform should stand at attention facing the flag with the right hand over the heart;
>
> (B) men not in uniform should remove their headdress with their right hand and hold the headdress at the left shoulder, the hand being over the heart; and
>
> (C) individuals in uniform should give the military salute at the first note of the anthem and maintain that position until the last note.

36 U.S.C. § 301(b)(1) (Supp. IV 1998). Similar requirements are imposed for stances when the flag is hoisted, lowered, or passed. *See* 4 U.S.C. § 9 (Supp. V 1999); *see also Id.* § 8(b) (the flag should never touch the ground or floor); *Id.* § 8(c) (flag should never be carried horizontally); *Id.* § 8(h) (flag should not be used to hold

or carry any object); *Id.* § 8(k) (when no longer suitable for display, flag should be destroyed in a "dignified way").

An objective observer would not view these detailed prescriptions for honoring the American flag--rituals that are observed daily across the nation--as an indication that Congress, or any governmental entity that observes such ceremonial respect, has established flag worship as a religion. We conclude that an objective observer similarly would not view the School District's Earth Day ceremonies as endorsing Gaia or Earth worship as a religion. Accordingly, we vacate the judgment's declaration that the Earth Day celebrations violated the Establishment Clause.

B. *Earth Day and the Free Exercise Clause*

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law ... prohibiting the free exercise [ ]of [religion]." U.S. Const. amend I. This Clause

> has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,--

> freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.

Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Where there is no indication that a restriction of a plaintiff's religious activities was the defendant's actual objective, but only that its actions, neutral on their face, had a restrictive effect, the proper inquiry is " 'whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989)); *see Wisconsin v. Yoder*, 406 U.S. 205, 220- 221, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

In the present case, although the Final Judgment and Permanent Injunction indicated that the Earth Day activities violated both the Establishment Clause and the Free Exercise Clause, the court made no ruling on Earth Day expressly relating to the latter Clause and made no findings sufficient to support a conclusion of free exercise violation. First, the court did not suggest that any restriction of the plaintiffs' religious activities was intended. To the contrary, as discussed in the preceding section, the court stated that the ceremonies had an "innocent [ ]" origin in the state statutory requirement that

public schools conduct exercises to instill in their students an interest in fish, wildlife, vegetation, and the soil.

Thus, the principal question was whether the Earth Day ceremonies had a religion-burdening effect. The district court focused principally on the faculty advisor's criticism of overpopulation of the Earth, which the court stated was contrary to the teaching of *Genesis*, and on Father Pacwa's interpretation of that remark as advocacy of birth control. The mere evidence that plaintiffs found that remark and perhaps some other aspects of the ceremonies offensive to their beliefs, however, did not suffice to prove a free exercise violation, for the court made no finding that students were required to participate in the Earth Day ceremonies. The principal of Fox Lane High testified that attendance was not compulsory, and we see no indication that the district court discredited that testimony. Absent a finding that students were required to attend or participate in the Earth Day ceremonies, we conclude that there was no interference with plaintiffs' free exercise of their chosen religion.

Accordingly, we reverse the judgment's declaration that the Earth Day ceremonies at Fox Lane High violated the Free Exercise Clause.

C. *Plaintiffs' Cross-Appeal*

Plaintiffs cross-appeal from so much of the judgment as dismissed their claims challenging the activities described in Part I.C. above.They maintain that those activities

violated the Establishment and Free Exercise Clauses, the Fourteenth Amendment right to privacy, and/or state law. As indicated in Part II above, many of the claims pursued by plaintiffs on their cross-appeal are claims that have become moot since the commencement of the litigation, and we lack jurisdiction to reinstate those claims.

As to the dismissed claims over which we have jurisdiction, we agree with the district court that those claims lack merit. In light of the discussion in Parts III.A. and B. above, we affirm their dismissal substantially for the reasons stated in that discussion and in the district court's opinion.

IV. THE RELIEF GRANTED

Finally, independently of the merits of plaintiffs' claims, we conclude that the relief granted in the district court's Final Judgment and Permanent Injunction was inappropriate.

First, as set out more fully in Part I.F. above, the district court's final judgment contains a mandatory injunction requiring the School District to adopt and publish guidelines (the "Guidelines Injunction") to ensure compliance with

> the Supreme Court's standards set forth in the cases quoted in this Court's Order and Opinion, so as to avoid coercing any student to participate in religion or its exercise or to violate any religious precept held

> by a child or his or her parents, and to further avoid sponsoring or disparaging religious beliefs held by students and or their parents.

Final Judgment and Permanent Injunction at 2. Even leaving aside our rejection of the district court's application of Supreme Court First Amendment doctrine, *see* Part III above, the terms of this injunctive provision are impermissibly vague. *See generally* Fed.R.Civ.P. 65(d) (injunction must "describe in reasonable detail ... the act or acts sought to be restrained"). The requirement that an injunction be specific "reflects Congress' concern with the dangers inherent in the threat of a contempt citation for violation of an order so vague that an enjoined party may unwittingly and unintentionally transcend its bounds." *Sanders v. Air Line Pilots Ass'n*, 473 F.2d 244, 247 (2d Cir.1972); *see* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2955, at 308-09 (2d ed. 1995).

Given the vast array of religious practices, an injunction stating simply that a party must create guidelines "to ensure" that school personnel will avoid coercing any pupil "to participate in religion or its exercise," Final Judgment and Permanent Injunction at 2, is insufficiently specific. Without greater guidance in the injunction itself, an attempt at compliance would likely result in guidelines that either were so detailed as to foreclose activities having no religious significance, or so general as to provide little guidance. Similarly flawed is the requirement that the School District promulgate a guideline to ensure that an

activity will not "violate any religious precept held by a child or his or her parents," *Id.*

Second, the prohibitory provisions of the Final Judgment and Permanent Injunction, quoted in Part I.F. above, are flawed either for jurisdictional reasons or because they were not adequately supported. The jurisdictional problems affect injunctive paragraphs B, C, and D, which prohibit the School District from sponsoring activities relating to nature tapes, worry dolls, and Ganesha. Those activities were found to have been conducted at Pound Ridge Elementary or Fox Lane Middle, not at any other school; and, as discussed in Part II above, plaintiffs' challenges to activities at Pound Ridge Elementary and Fox Lane Middle have become moot.

We note that the district court stated in its Standing Opinion that all of the injunctive provisions were to be applicable to all schools in the School District. Although that view was consistent with the district court's view that any Bedford taxpayer could bring suit to halt any school activity characterized as religious, even without having any child who was or would be eligible to attend school, we have rejected taxpayer standing in this case. Moreover, given the court's reliance on the view that various activities had a subtly coercive effect on children who were young and impressionable, *see, e.g.*, 45 F.Supp.2d at 383-85, blanket prohibitions against a given activity at all schools at whatever level, without particularized findings as to how an objective observer would view each activity at each level, were inappropriate.

As to the Earth Day ceremonies, discussed in Part III.A. above, the prohibitions were inappropriate because the specific features enjoined, such as drum rolls and globes on poles, were not shown to be used in ways that were religious; and no evidence has been cited to support the finding that the ceremonies included worship of the Earth or liturgies addressed to the Earth as if it were the Creator or a Divine Being.

Finally, given our reversal of the district court's rulings in favor of plaintiffs on their First Amendment claims, the district court's award of attorneys' fees to them as "prevailing part[ies]," 42 U.S.C. § 1988, must also be reversed. *See, e.g., Russo v. State of New York*, 672 F.2d 1014, 1023 (2d Cir.1982) ("The teachings of the Supreme Court ... foreclose [an] expansive interpretation of section 1988" that would allow "attorney's fees under section 1988 to a party who does not succeed on his civil rights claim ...."), *modified on other grounds*, 721 F.2d 410 (2d Cir.1983).

CONCLUSION

We have considered all of the parties' contentions in support of their respective appeals. For the foregoing reasons the judgment of the district court is vacated insofar as it adjudicated claims challenging activities at Pound Ridge Elementary School and Fox Lane Middle School, and is remanded for dismissal of those claims for lack of subject matter jurisdiction; the judgment is reversed insofar as it declared activities of the School District to

violate the First Amendment and granted injunctive relief and attorneys' fees; and it is affirmed insofar as it dismissed other claims asserted by plaintiffs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT M. ALTMAN, et al.,

Plaintiffs,

96 Civ. 7791 (CLB)

-against-

BEDFORD CENTRAL SCHOOL DISTRICT, et al.,

Defendants.

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FINAL JUDGMENT AND
PERMANENT INJUNCTION

Brieant, J.

This matter having been tried without a jury before this Court; and the Court having made its Findings, Conclusions and Order of May 21, 1999, and on all papers and proceedings had herein, it is hereby:

ORDERED AND ADJUDGED as follows:

The Bedford Central School District has, by and through its personnel as identified in the record of these proceedings, violated the establishment clause and free exercise clauses of the First Amendment of the United States Constitution and Article 1 Section 3 of the New York State Constitution, by the following activities on school premises:

A. Worship of the Earth and presentation of a liturgy addressed to the Earth as if it were a creator or divine, which liturgy includes the symbolic presentation of gifts to the Earth, the erection of "symbolic structures" equal to an altar, a chorus of ceremonial drums, and a globe held by the three bamboo sticks in a green circle in front of the students as a focal point of the worship service, as well as the clearly religious teaching that "we came from the Earth, we are part of the Earth and we are all involved in this cycle. One day we will become [dead] and then we'll go back to the Earth," as well as by school sponsorship of prayers to the Earth and recital of a creed of worshiping the Earth as noted at pp. 53-54 of the Findings,Conclusions, and Order.

B. Sponsoring and encouraging the fashioning of charms in the form of so-called "worry dolls" by elementary school students in the Discovery Center at Pound Ridge Elementary School, the sale of said charms in the school store, and the advice by school personnel to impressionable students that said charms have supernatural powers to "chase away your bad dreams" and "take away all our worries."

C. Directing elementary school students to make likenesses or images of the Hindu god, Lord Ganesha, out of paper or clay; and it is further

ORDERED AND ADJUDGED that Bedford Central School District must adopt and publish guidelines to teachers and others to insure that they will abide by the Supreme Court's standards set forth in the cases quoted in this Court's Order and Opinion, so as to avoid coercing any student to participate in religion or its exercise or to violate any religious precept held by a child or his or her parents, and to further avoid sponsoring or disparaging religious beliefs held by students and or their parents, and it is further

ORDERED AND ADJUDGED that defendants Bedford Central School District and its teachers, administrators and other personnel, Dr. Bruce Dennis in his capacity as Superintendent of the Schools of the Bedford Central School District, Deborah Timberlake in her capacity as President of the Board of Education of the Bedford Central School District, James Alloy in his capacity as Principal of Fox Lane Middle School, Richard Kraemer in his capacity as Principal of Fox Lane High School, as well as their successors in office, and all those acting in concert with them or having actual notice of this Judgment are hereby

ENJOINED AND RESTRAINED as follows:

A. From sponsoring worship of the Earth or presentation of a liturgy addressed to the Earth as if it were a creator or divine, including any symbolic presentation of gifts to the Earth, the erection of

'symbolic structures' equal to an altar, a chorus of ceremonial drums, or any globe on bamboo sticks or other totem serving as a focal point of the worship service, or any religious teaching in connection therewith;

B. From sponsoring prayers to the Earth or any creed of worshiping the Earth by means of audio tape or otherwise;

C. From sponsoring, instructing or encouraging the fashioning of charms in the form So-called "worry dolls" by students in the Discovery Center at Pound Ridge Elementary School or elsewhere in the District, the sale of said charms in any school store, or from instructing or suggesting to students through school Personnel or otherwise that said charms have supernatural powers to "chase away your bad dreams," "take away all our worries," or any other supernatural or occult power;

D. From directing or encouraging students to make likenesses or images of the Hindu god, Lord Ganesha, or any other god.

And it is further

ORDERED AND ADJUDGED that the attorneys for the plaintiffs shall recover from the Bedford Central School District their attorneys' fees and disbursements in the amount of $106,856.61 pursuant to 42 U.S.C. Section 1988(b), and that said award of attorneys' fees and costs

shall bear interest at the rate provided by law pursuant to 28 U.S.C. Section 1961 from the date of this judgment until the date of payment; and it is further

ORDERED AND ADJUDGED that all other claims for relief made by the plaintiffs are denied for want of merit.

SO ORDERED.

Dated: White Plains, New York
July 23, 1999

s/Charles L. Brieant,
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT M. ALTMAN, et al.,

Plaintiffs,

96 Civ. 7791 (CLB)

-against-

MEMORANDUM & ORDER
(Motion to Dismiss)

BEDFORD CENTRAL SCHOOL DISTRICT, et al.,

Defendants.

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Brieant, J.

This civil rights litigation was tried before this Court without a jury on February 22, 24, and March 1, 2, and 4, 1999 and fully submitted for decision on March 29, 1999. Detailed Findings of Fact and Conclusions of Law were filed on May 21, 1999 and counsel were directed to submit a final judgment in order that both parties might have recourse to the Court of Appeals. Thereafter, by a motion filed June 18, 1999, Defendants for the first time moved to dismiss all claims regarding activities at the Pound Ridge Elementary School on the ground that the Court lacks subject matter jurisdiction because, "None of the Plaintiffs

continue to maintain any personal stake in the litigation." (Affidavit of Neil M. Block, Esq., filed June 18, 1999).

The motion focuses on Ross Altman, a student of elementary school age and a resident of the Bedford Central School District who had been enrolled in the local parochial school with the intent to return to the public schools when and if the alleged violations had been remedied.

Defendants now assert for the first time that although the Altman family apparently resided within the District when the lawsuit was commenced, their home was sold on January 4, 1999 to Rosalyn Stone-Pollock and her husband, Michael, and that the residence was vacant in September 1998 and perhaps as early as March 1998. A Deed dated March 12, 1998 and recorded May 16, 1998 shows that Ross Altman's parents purchased a home in New Canaan, Connecticut, and apparently some time in March 1998 ceased using the Bedford School District's transportation for the children to attend St. Patrick's School. Counsel for Defendant School District claims that facts now divulged for the first time were unknown "until very recently," although probably they could have been ascertained with any reasonable diligence any time after March 1998.

"The mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit, including the pendency of the appeal." Cook v. Colgate University, 992 F.2d 17, 19 (2d Cir. 1993)(citations omitted)(equitable claims against university mooted by graduation of plaintiffs). "A case is moot, and accordingly the federal courts have no jurisdiction over the litigation, when the parties lack a cognizable interest in the outcome." Fox v. Board of Trustees of the State University

of New York, 42 F.3d 135, 140 (2d Cir. 1994) (internal quotations and citations omitted).

Ordinarily this Court would agree that the case was mooted as to Ross Altman and his parents when they moved out of the District since the Altmans would no longer have a personal stake in the challenged activities at the Pound Ridge Elementary School. See Fox, 42 F.3d at 140 ("The required legally cognizable interest has alternatively been described as a requirement that a plaintiff have a 'personal stake' in the litigation"). Defendants extend this conclusion and now seek to dismiss all claims premised on activities at the Pound Ridge Elementary School, based on the undisputed fact that none of the remaining plaintiffs, students and parents alike, have any personal stake in the challenged activities at the elementary school since the student-plaintiffs are no longer at an age where they could attend the Pound Ridge Elementary School.

Subsequent to the filing of defendants' motion, the Court has been informed that on July 24, 1999, the DiNozzi family will be relocating to Middletown, Delaware. Declaration of Cecil D. DiNozzi (doc. no. 94, filed July 16, 1999), Paragraph 10. Based on this information, the Court is constrained to find subject matter jurisdiction, if any, premised solely on standing of the plaintiff Mary Ann DiBari and her two grandchildren, Krystal and Tiana. On page 2 of the Findings of Fact and Conclusions of Law filed on May 21, 1999, the Court made the following findings as to the DiBari family:

Plaintiff Mary Ann DiBari is also a resident and taxpayer, and legal guardian of her two granddaughters. Her granddaughter Krystal, age 15 at trial, attends Fox Lane High School. Formerly, she attended Fox Lane

Middle School. Her granddaughter Tiana (Niki), age 14 at trial, attends Fox Lane Middle School. She attended Pound Ridge Elementary School in fourth and fifth grade. No new evidence has been placed before this Court which would disturb these findings. Accordingly, the Court finds that Ms. DiBari is still a taxpayer within the defendant Bedford Central School District, and thus responsible for the funding of the education of her two grandchildren who are still enrolled in schools within the defendant district, as well as funding the general budget for general school district expenses. The Court also notes that the final injunction granted to the plaintiffs is to be enforced district-wide and is not limited to the specific school where the challenged activity occurred initially.

As a taxpayer, Ms. DiBari continues to have a personal stake in the outcome of this litigation. In United States v. City of New York, 972 F.2d 464, 471 (2d Cir. 1992), our Court of Appeals re-affirmed the long-standing doctrine of standing by municipal taxpayers to challenge allegedly unlawful municipal expenditures. See Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (popularly known as Frothingham v. Mellon); Board of Education of the Mt. Sinai Union Free School District v. New York State Teachers Retirement System, 60 F.3d 106 (2d Cir. 1995).

This Court's decision after trial in this case is explicit that the defendant district has engaged in conduct that violated the Establishment Clause of the First Amendment of the Constitution. The record is clear that unless prevented by the court, the activities will continue in the future. Public money supported that conduct and those who engaged in it. Actions of the school district are funded, in large part, by local real property taxes. Accordingly, the Court maintains subject matter jurisdiction over this case by

reason of the municipal taxpayer standing of plaintiff Mary Ann DiBari as well as her status as legal guardian of her two grandchildren. See Wisconsin v. Yoder, 406 U.S. 205, 230-231, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

Defendants' reliance on Flast v. Cohen, 392 U.S. 83, 101-106 (1968) to support a contention that only Establishment Clause violations, as opposed to Free Exercise Clause violations, are actionable on the part of taxpayers, is misplaced. Flast, and the distinction it draws between these two seemingly overlapping clauses of the First Amendment, is limited to analysis of federal tax-payer standing, not the municipal taxpayer standing possessed by Ms. DiBari. Equally misplaced is defendants' reliance on the earlier Supreme Court case of Doremus v. Board of Education, 342 U.S. 429 (1952), which the Flast court clearly recognized as a state-taxpayer standing case. See Flast, 392 at 102.

To the extent that the lead-plaintiff in the Doremus court attempted to assert municipal-taxpayer standing, that argument was rejected simply because the lead-plaintiff was not a taxpayer in the same municipality where the challenged activities took place. A municipal taxpayer such as Ms. DiBari has standing to complain about Free Exercise or Establishment Clause violations accomplished in a school within the municipality by its paid employees. See Board of Education of the Mt. Sinai Union Free School District, 60 F.3d at 110; United States v. City of New York, 972 F.2d at 471.

CONCLUSION

For the reasons set forth above, the motion filed June 18, 1999 is denied. A final judgment has been signed.

SO ORDERED.

Dated: White Plains, New York

July 23, 1999

s/Charles L. Brieant,

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT M. ALTMAN, et al.,

Plaintiffs, 96 Civ. 7791 (CLB)

-against-

MEMORANDUM & ORDER (Counsel Fees)

BEDFORD CENTRAL SCHOOL DISTRICT, et al.,

Defendants.

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Brieant, J.

Following a bench trial and the filings of Findings of Fact and Conclusions of Law, which upheld a few of Plaintiffs' many claims against the Defendants arising out of First Amendment violations, the Plaintiffs have submitted an application for legal fees. Familiarity on the part of the reader with that application and the history of the underlying litigation is assumed. The Court, by its Findings, Conclusions and Order of May 21, 1999, at page

60 has ruled that, "Plaintiffs are prevailing parties, at least in part."

Lead counsel for the Plaintiff, Christopher A. Ferrara, Esq., has submitted an application in behalf of American Catholic Lawyers Assoc., Inc.. This application seeks costs and disbursements, including depositions, travel expenses, expert witness fees, paralegal and support services, and an associate attorney, Mark N. Troobnick, Esq., who was hired for a specific effort, totaling in all $29,055.51, and also seeks to recover the sum of $68,926.00 for the itemized lodestar of Mr. Ferrara, $37,035.00 for the services of Joseph P. Infranco, Esq., and $23,707.50 for the services of James M. Bendell, Esq..

The Court agrees that while the degree of overall success goes to the reasonableness of the fee, the Court may not simply cut the fee request on a mathematical basis by considering the total number of issues. While Plaintiffs believed that they were attacking a policy of the School District, or the so-called "Bedford Program", the initial Complaint set forth what appeared to this Court to be a vast number of discrete actions which, at the request of the Court, were reduced in number to those actually tried. The Court agrees with Plaintiffs' contention that it cannot dissect the lawsuit into issues and parts of issues as to which the Plaintiffs did not prevail, thereby decreasing the total hours claimed by arbitrary percentages. See Northcross v. Board of Ed. of Memphis City Schools, 611 F.2d 624, 636 (6th Cir. 1979). See also, Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). The Court also finds that these attorneys by their efforts did bring about a substantial change in the legal relationship between the Plaintiffs and the School District, which benefits other parents and students, and serves the public interest.

The application shows that Mr. Ferrara billed his fees at the flat rate of $200.00 per hour. Attorney Infranco billed $250.00 per hour for his court time and $200.00 per hour for other time. Attorney Bendell (who did most of the trial work) billed at the rate of $145.00 per hour. These hourly rates are clearly reasonable in comparison with hourly rates awarded to prevailing plaintiffs' attorneys in far less complex cases tried in this District.

The Court recognizes that litigation, particularly hard-fought litigation over claims of principle, which this case involved, tends to be a wasteful process. Services seldom are rendered with the time clock in mind, or with the clear recognition that at the end of the day it may be essential to justify the hours spent. The efforts of the attorney are directed only toward satisfying the client and the needs of the Court, and obtaining the best possible result, and do not lend themselves to a judgment based on hindsight. Nevertheless, it is reasonable to make some adjustments for time not well spent. The Court finds some excess in the time consumed in conferences between the attorneys not specifically described as to content, and continuous telephoning to clients. The Court reduces the claim of attorney Ferrara by seventeen (17) hours, or $3,400.00 on this ground, and reduces the time of Infranco by five (5) hours, or $1,000.00.

The Court is then left with the problem of reducing the net lodestar further to eliminate the services attributable to claims which were not successful or which were abandoned prior to trial. This reduction presents a difficult task; it does not invoke a precise science. Undoubtedly most of the services would have been incurred in any event had Plaintiffs' counsel limited themselves at the inception of the litigation to the claims that were ultimately successful. The conduct of the School District with regard to the

unsuccessful claims may well have had a bearing on issues such as motivation and intent. Indeed, some of the unsuccessful claims involved very close factual issues which were prosecuted in good faith and in the public interest, and might very well have gone the other way. Other of the claimed violations were simply not the responsibility of these defendants. None of the claims sued upon could be regarded as wholly unrelated to the claims on which the Plaintiffs succeeded.

Following the analytic framework established by the Supreme Court in Hensley, *supra* (see *id.* at 434-35), and relying also on the decision of our Court of Appeals in Grant v. Martinez, 973 F.3d 96, 101 (2d Cir. 1992), the Court determines that Plaintiffs' level of success warrants a reduction of the net lodestar by 40%. See DeCarlo v. Perales, 963 F.Supp. 181-184-895 (N.D.N.Y. 1997); Cefali v. Buffalo Brass Co., 748 F.Supp. 1011, 1020 (W.D.N.Y. 1990) (20% reduction for unsuccessful claims).

This leads to a net amount of $77,801.10 to be recovered, together with the disbursements and expenses in the amount of $29,055.51, making a total award of $106,856.61. The Court has considered all of the other objections made to the fee award and finds them without merit. The final judgment shall contain the appropriate provision for the award of the fee and disbursements.

SO ORDERED.

Dated: White Plains, New York

July 23, 1999

s/Charles L. Brieant,

U.S.D.J.

UNITED STATES DISTRICT COURT,

S.D. NEW YORK.

Robert M. ALTMAN and Victoria L. Altman, his wife, Individually and as parents of minor children, Russell Altman and Ross Altman, Mary Ann Dibari, Individually and as lawful guardian of minor children Krystal M. Dibari and Tiana N. Dibari, Joseph M. Dinozzi and Cecile D. Dinozzi, his wife, Individually and as parents of minor children, Jon M. Dinozzi, Daniel J. Dinozzi, Steven M. Dinozzi, and Joseph A. Dinozzi, Plaintiffs,

v.

BEDFORD CENTRAL SCHOOL DISTRICT, Dr. Bruce Dennis, in his capacity as Superintendent of Schools of the Bedford Central School District and Agent/Administrator of its Board of Education; Jane Doe (name unknown, post currently vacant), in his or her capacity as Assistant Superintendent in charge of Curriculum and Instruction for the Bedford Central School District and Agent/Administrator of its Board of Education, Deborah Timberlake, in her capacity as President of the Board of Education of Bedford Central School District, Board of Education of the Bedford Central School District, James Young, in his capacity as Principal of the Pound Ridge

Elementary School, James Alloy, in his capacity as Principal of Fox Lane Middle School, and Richard Kraemer, in his capacity as Principal of Fox Lane High School, Defendants.

No. 96 Civ. 7791(CLB).

May 21, 1999.

FINDINGS, CONCLUSIONS, and ORDER

BRIEANT, District Judge.

This action filed October 15, 1996 for declaratory and injunctive relief under the First and Fourteenth Amendments of the United States Constitution and Article I, § 3 of the New York State Constitution, and for redress of the Plaintiffs' rights under 42 U.S.C. §§ 1983 and 2000bb(b)(1); 20 U.S.C. § 1232(f); 34 C.F.R. § 98.1; 20 U.S.C. § 1232(h)(b); and 34 C.F.R. § 98.4. was tried before this Court without a jury on February 22, 1999, continuing on February 24, 1999, March 1, 2 and 4, 1999, concluding on March 4, 1999. Post verdict submissions were received on March 29, 1999. Subject matter jurisdiction is established pursuant to 28 U.S.C. §§ 1331 and 1343(3). The Court now makes its Findings of Fact and Conclusions of Law after Trial.

The Parties

Plaintiffs Robert M. Altman and Victoria L. Altman are parents of minor children. They are residents and

taxpayers in that portion of the Town of Pound Ridge which is within the area served by the Defendant Bedford Central School District. Their child, Russell Altman, age 14 at the time of trial, had attended Pound Ridge Elementary School until the fifth grade, but was removed by his parents by reason of the controversy set forth in the Complaint, and will attend St. Patrick's parochial school until the case is resolved. Ross Altman, a younger child of the Altman Plaintiffs, attended third grade at the Bedford Central School District, and is now also at St. Patrick's.

Plaintiff Mary Ann DiBari is also a resident and taxpayer, and legal guardian of her two granddaughters. Her granddaughter Krystal, age 15 at trial, attends Fox Lane High School. Formerly, she attended Fox Lane Middle School. Her granddaughter Tiana (Niki), age 14 at trial, attends Fox Lane Middle School. She attended Pound Ridge Elementary School in fourth and fifth grade.

Plaintiffs Joseph M. DiNozzi and Cecile D. DiNozzi, are the parents of Jon, Daniel, Steven and Joseph. The DiNozzi's are also resident taxpayers. Their child, Jon, age 17 at trial, was attending Fox Lane High School, and had attended Pound Ridge Elementary School. Daniel, age 15 at trial, was withdrawn by his parents from the Fox Lane Middle School in the Fall of 1995 and now attends parochial school, "where he will remain until the matters in controversy are resolved." (Complaint at 6(b)). Steven DiNozzi, age 13 at trial, attended the Pound Ridge Elementary School but was removed in September 1995 for the same reasons. Joseph DiNozzi, age 13 at trial, also

attended the Pound Ridge Elementary School and was likewise removed by his parents, to attend St.Patricks.

Defendants are the officials administering the Bedford Central School District, including the Superintendent of Schools, Assistant Superintendent in charge of curriculum and instruction, the President and Members of the Board of Education, and the Principals of the Elementary School, the Middle School and the High School. They are responsible for the curriculum, instructional materials and teaching practices attacked by this lawsuit.

The Dispute

Plaintiffs all allege that they are adherents of Roman Catholicism, "whose sincerely held religious beliefs have been violated" by the acts alleged in the Complaint, with further violations imminently threatened. Plaintiffs allege that they became aware of exposure of their children by the Defendants to, "objectionable activities on school premises, either without parental consent or under circumstances which render parental consent ineffective to protect Plaintiffs' children." (Complaint at 7). The Complaint pleads five separate claims or so-called "causes of action." Pleading facts common to all of the claims, Plaintiffs allege that a totality of "methodologies, exercises, materials and presentations" have been used, implemented and promoted by the School District, which violate the Free Exercise Clause of the First Amendment, or alternatively violate The Establishment Clause thereof. Particularly, Defendants are accused of having developed the so-called "Bedford

Program" which allegedly involves, "the promotion of Satanism and occultism, pagan religions and a New Age Spirituality."

Detailed allegations in the Complaint which comprise 74 paragraphs, beginning at § 20, concern the implementation of the Bedford Program, and teaching practices which are claimed to violate Plaintiffs' rights and disparage their own religious faith. Little purpose will be served by detailing all the religious and quasi-religious events which Plaintiffs claim their children were compelled to join, nor by a complete reiteration of the Complaint. Some of the conduct complained of does not seem to have religious overtones, but much of it does. Other facts alleged are intrusive but apparently without religious connotations. The underlying facts are pleaded separately as violations of the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution (First Claim); a violation of the Religious Freedom Restoration Act (Second Claim) [1/] [FN1]; and violations of Fourteenth Amendment parental and privacy rights (Third Claim). The Fourth Claim pleaded alleges a violation of Article I, Section 3 of the New York State Constitution, which essentially tracks the First Amendment to the United States Constitution.

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1. This Claim has been dismissed on the authority of *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) decided on June 25, 1997 by our Supreme Court after this action was filed.

Separate discussion of this claim is unnecessary. The Fifth Claim pleaded alleges that to the extent federally funded programs are involved, 20 U.S.C. § 1232(h)(b), and 34 C.F.R. § 98.4 *et seq.*, commonly referred to as the Pupil Protection Rights Amendment, are also violated. The Sixth Claim alleges that psychological testing, examination and counseling and treatment of students is a health service for which prior parental consent is required under § 2504 of the New York State Public Health Law.

Overview of the Case

This is agenda driven litigation, from both sides. Plaintiffs' agenda is to obtain judicial adoption of a single standard for the treatment of religion in the school system: It has been the Plaintiffs' position all along that what this case is really about is applying the same draconian limitations imposed by the federal courts on Judeo-Christian religious practice in the public schools to Eastern religions and religious-type practices. (Plaintiffs' submission filed March 29, 1999, Doc. 68 at p. 8). Also, "without consistency in the application of the law, there is no law at all. This case is a plea to end a double standard of religious influence in the public schools and bring consistency." *Id.* p. 19.

Defendants' agenda is to defend and extend their premise: A school district has a statutory obligation to prepare students to assume the responsibilities of citizenship. A cramped or stilted curriculum distorted to meet the heightened sensibilities of individuals such as Plaintiffs herein, necessarily deprives the students of the broader information base and experiences which they require in order to participate fully in today's society. (Pretrial brief filed February 16, 1999 [Doc. 65 at 30].)

Litigation is a blunt, Procrustean and generally ineffective means to satisfy either of these goals. The proof at trial shows that there is no such thing as the "Bedford Program." At most, the proof shows that numerous activities, many of them random acts initiated by

individual school teachers luxuriating in their academic freedom, may have offended the Establishment Clause or the Free Exercise Clause, or both. This Court lacks the power to reconstitute or to approve or disapprove an entire school curriculum, and could not as a practical matter administer any injunctive decree which would seek to enforce any such determination. Furthermore, it is not the function of this Court to determine whether any particular school practice is "offensive to Catholic parents." This criterion was employed throughout the trial by the Plaintiffs' expert witness, Father Mitchell Chester Pacwa, a Roman Catholic priest belonging to the Society of Jesus. Since 1996, Father Pacwa has served as Assistant Professor of Sacred Scripture at the University of Dallas, Texas, Institute of Religious and Pastoral Studies.[2] With due respect to the witness, the issue in the case is not one of offensiveness to Catholic parents, but rather whether the conduct violates the Constitution. That there may have been some disparagement of the beliefs of Roman Catholics, Jews and Christians of other denominations seems apparent. The Court views with understanding and deep concern the idea that a public school system should be engaging in practices which are "offensive to Catholic parents," or for that matter offensive to any other members of the community served.

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[2] Representatives of the local parishes affected by this litigation took no part in the case.

Public education generally is not among the responsibilities entrusted to the federal courts, nor is it a subject upon which we can claim any special expertise. This case concerns curriculum content. There is an understandable tension between majoritarian government and the desires of individuals to live and raise their children uncontaminated by government sponsored teachings which appear to them to be worthless or hostile to their religious beliefs. These forces clash readily in the area of education, where our nation has enjoyed a long history of encouraging families to take responsibility for the instruction of their own children, while at the same time, making school attendance compulsory and granting control of the curriculum to state and local officials.

The goal of local home rule is to allow communities to develop rules and regulations for the management--or mismanagement--of their own affairs, through forms of majority rule existing by the very nature of a republican form of government. An individual may disagree with a particular policy or rule implemented by duly elected local representatives within the scope of the responsibility entrusted to them. Ordinarily, that person must abide by the general law while attempting to persuade others in the community to revise the policy or rule, or to elect new local representatives who will do so.

The Supreme Court has recognized the benefits of local responsibility for public education:

> [O]ne of the peculiar strengths of our form of government [is] each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.' No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 50, 93 S.Ct. 1278, 1305, 36 L.Ed.2d 16 (1973) (Powell, J.) (quoting in part from the dissent of Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932)). It is "long recognized that local school boards have broad discretion in the management of school affairs." *Board of Education Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 863, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 435 (1982) (Brennan, J.).

New York, by § 1804(1) of the Education Law, makes applicable to a Central School District all powers granted to a Union Free School District except as otherwise provided, and by § 1709(3) of that law, the Defendant School Board controls the curriculum. See New York State Education Law § 1709(3) ("The said board of education of every union free school district shall have power, and it shall be its duty ... [t]o prescribe the course of study by which the pupils of the schools shall be graded and classified.").[3]

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3. If the so-called Bedford Program is as offensive to Roman Catholicism as Plaintiffs claim, it probably also offends other

Accordingly, this Court must reject any consideration of whether any or all of the practices complained of are "offensive" to Roman Catholics or anybody else and approaches instead the more narrow issue of whether the First Amendment as construed by the Supreme Court of the United States and the Court of Appeals of this Circuit has been violated. We must leave the offensiveness for redress, if any there may be, to be taken at the polls at the next annual school election.

The relevant provisions of the First Amendment, the first of the Bill of Rights, read:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...

U.S. CONST. amend. I

It is clear that this amendment is made applicable to the states by the Fourteenth Amendment, and that any action by a school board, public school teacher or administrator is a state action within that Amendment, and actionable in this Court under 42 U.S.C. § 1983.

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parents belonging to other denominations or having no religion. Such aggrieved persons may, if so advised, attend the annual meeting and elect persons of their choice to the School Board who will return the curriculum to basics, if that is what the people of Bedford and Pound Ridge desire.

We know from history that this Amendment was passed in light of concern by Congress and the states that their new national government might at some future time follow the practices of European states in which the ruler for the time being presumed to dictate the religious affiliations of his subjects and interfere with the free exercise of their own conscience. We may not forget that "the men and women who left Scrooby for Leyden and eventually came to Plymouth in order to worship God where they wished and in their own way must have thought they had terminated the interference of public authorities with free and unhandicapped exercise of religion."[4]

Application of the First Amendment

Plaintiffs assert that various activities of the so-called "Bedford Program" violate both the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution, quoted, *supra*. Despite deriving from the same organic constitutional provision, the Supreme Court has emphasized a critical difference "between government speech endorsing religion, which the

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[4] Chief Judge Albert Conway writing for the New York Court of Appeals in *Matter of Community Synagogue v. Bates*, 1 N.Y.2d 445, 458, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956).

Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372, 110 L.Ed.2d 191 (1990).

Early precedent on the Establishment Clause invoked the comment of Thomas Jefferson, that the clause was intended to erect "a wall of separation between Church and State." *Reynolds v. United States*, 98 U.S. 145, 162, 25 L.Ed. 244 (1878). This "wall" and the clause itself are the product of the "vivid mental picture of conditions and practices which [the original Colonists] fervently wished to stamp out in order to preserve liberty for themselves and for their posterity." *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947). Although analysis of government conduct under the Establishment Clause has been embellished considerably, for better or worse, since its inception over 200 years ago, some principles are clear:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied

> to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Everson, 330 U.S. at 15-16, 67 S.Ct. 504.

Over time, the basic thrust of the clause has remained one of government neutrality towards religion. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 839, 115 S.Ct. 2510, 2521, 132 L.Ed.2d 700 (1995) ("[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."); *Board of Ed. of Kiryas Joel v. Grumet* 512 U.S. 687, 696, 114 S.Ct. 2481, 2487, 129 L.Ed.2d 546 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents.") (internal quotations and citation omitted).

Analysis of cases presented under the Establishment Clause has experienced rapid evolution over the past quarter century of our nation's history. The three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), endures as a starting point of Establishment Clause analysis despite premature reports of its demise. See e.g. Hsu By and Through Hsu v. Roslyn

Union Free School Dist. No. 3 85 F.3d 839, 864 n. 26 (2d Cir.), *cert. denied,* 519 U.S. 1040, 117 S.Ct. 608, 136 L.Ed.2d 534 (1996). Lemon requires a challenged government practice (1) to have a secular purpose,[5] (2) to have a primary effect that neither advances nor inhibits religion, and (3) not to foster excessive state entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105.

The Endorsement Test

In *Lynch v. Donnelly*, 465 U.S. 668, 688-693, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring), Justice O'Connor suggested that the Court refine the Lemon test by interpreting the second prong of the Lemon test into an "endorsement test." Under this analysis, the challenged conduct impermissibly endorses religion if it has either the purpose or effect of communicating a message of government endorsement or disapproval of religion. 465 U.S. at 691-92, 104 S.Ct. 1355. In considering the conduct's effect, the question of endorsement is evaluated from the perspective of a "reasonable observer." *See Wallace v. Jaffree*, 472 U.S. 38, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring).

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5. A court should be deferential to the state's articulation of a secular purpose, but the secular purpose must be sincere and not a sham. *Edwards*, 482 U.S. at 586-87, 107 S.Ct. at 2579.

In *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), a creche case, the particular display was held to violate the Establishment Clause, but the Court held that display of a Menorah next to Christmas tree did not have the unconstitutional effect of endorsing Christian or Jewish faiths. The Supreme Court recognized the endorsement test, which "precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 593, 109 S.Ct. 3086 (internal quotations marks and alterations omitted). In *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), the Supreme Court took its closest step towards overruling the Lemon test in favor of the endorsement test. In holding that it was constitutional for public school teachers in New York State to provide remedial education to disadvantaged children attending parochial schools, the Court entrusted the district courts with evaluating on a case by case basis whether the challenged government activity had the effect of advancing religion. 521 U.S. at 234, 117 S.Ct. 1997.

Our Court of Appeals, in *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 (2d Cir.1999), held recently that it would adhere to Lemon but would add the Agostini analysis to its Establishment Clause framework. See also *Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3* 85 F.3d 839, 864-67 and n. 26 (2d Cir.), *cert. denied,* 519 U.S. 1040, 117 S.Ct. 608, 136 L.Ed.2d 534 (1996) (applying the Lemon test in a

school-related Establishment Clause case, but "not[ing] that the critical factor" was the endorsement test).

The Coercion Test

In *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), a case involving the recital of a prayer by a member of the clergy at a high school graduation ceremony, the Supreme Court declined an invitation to reconsider Lemon. The Court, instead, held that under the First Amendment, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to ... participate in religion or its exercise...." *Id.* at 587, 112 S.Ct. 2649. Even a "subtle coercive pressure" by a government official to engage in religious activity may violate the First Amendment. *See Id.* at 591, 112 S.Ct. 2649. It is of special significance to our consideration of the instant case that the Court in Lee placed great weight on protecting impressionable students:

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. *See, e.g., School Dist. of Abington v. Schempp*, 374 U.S. 203, 307, 83 S.Ct. 1560, 1616, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 584, 107 S.Ct. 2573, 2578, 96 L.Ed.2d 510 (1987); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 261-262, 110 S.Ct. 2356, 2377-2378, 110 L.Ed.2d 191 (1990) (Kennedy, J., concurring). Our decisions in *Engel v. Vitale*, 370 U.S.

421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), and *School Dist. of Abington, supra*, recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. at 661, 109 S.Ct. at 3137 (Kennedy, J., concurring in judgment in part and dissenting in part). What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

505 U.S. at 592, 112 S.Ct. 2649

The Supreme Court first considered impressionable students in connection with Establishment Clause analysis in *Edwards v. Aguillard*, when the Court declared unconstitutional Louisiana's "Creationism Act" which forbid the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of "creation science." The Court considered the effect on the impressionable young students of factors such as mandatory attendance, the students' emulation of teachers as role models and the children's susceptibility to peer pressure. 482 U.S. at 584, 107 S.Ct. 2573.

This concern over impressionable youth has often been relied on by the Supreme Court to invalidate statutes which appear to advance religion in public elementary and secondary schools. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29, (Alabama statute authorizing moment of silence for school prayer); *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (posting copy of Ten Commandments on public classroom wall); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) (statute forbidding teaching of evolution); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (daily reading of Bible); *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962) (recitation of "denominationally neutral" prayer).

Because this case affects elementary and secondary public school children of young and impressionable age, our analysis of the questioned practices of the school district should proceed under the "coercion test." The Court in Edwards observed that although "states and local school boards are generally afforded considerable discretion in operating public schools ... the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." 482 U.S. at 583, 107 S.Ct. 2573 (internal citations omitted). Justice Brennan's opinion in Edwards expresses the problem facing this Court: "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used

to advance religious views that may conflict with the private beliefs of the student and his or her family.... '[T]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools....' " 482 U.S. at 584, 107 S.Ct. 2573 (citing *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 231, 68 S.Ct. 461, 475, 92 L.Ed. 649 (1948) (opinion of Frankfurter, J.)).

Any First Amendment analysis invokes the threshold question: what is religion? Plaintiffs' complaint challenges both school district activity concerning recognized religions such as Hinduism, as well as Earth worship, the new age religions, superstition,[6] and the

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6. Superstition is defined as "1 a: a belief, conception, act, or practice resulting from ignorance, unreasoning fear of the unknown or mysterious, morbid scrupulosity, trust in magic or chance, or a false conception of causation [the superstition that a black cat crossing one's path portends bad luck] [superstition such as child-sacrifice, divination, soothsaying, enchantments, sorceries, charms (by magic knots, spells or incantations), ghosts, spiritualistic mediums, necromancy] b: an irrational abject attitude of mind toward the supernatural, nature, or God resulting from such beliefs, conceptions, or fears 2 a: idolatrous religion b: idolatry [An alien religion whose superstitions and ritual were regarded with abhorrence] 3: a fixed irrational idea: a notion maintained in spite of evidence to the contrary." WEBSTER'S THIRD NEW INTERNATIOAL DICTIONARY 2296 (1993)

occult.[7] The Supreme Court has observed correctly, that "religion is not defined in the constitution," *Reynolds v. United States*, 98 U.S. 145, 162, 25 L.Ed. 244 (1878). While engaged in refining continually its own standards for First Amendment analysis, the Supreme Court has declined or failed to provide the district courts with a working definition of "religion." *See* James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 Seton Hall. Const. L.J. 23 (1995). This Court remains mindful of the words of Justice Potter Stewart who when faced with the challenge of defining obscenity in the context of a different First Amendment right, could say no more than "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring.).

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7. Occult is defined as "**1:** deliberately kept hidden: not revealed to others: secret, undisclosed <too occult to be shown to uninitiate eyes> < deep subterranean occult jealousy> **2:** not to be apprehended or understood: demanding more than ordinary perception or knowledge: abstruse, mysterious, recondite <as far as the general public was concerned, the museum was an esoteric, occult place> <occult matters like nuclear physics, radiation effects and the designing of rockets> <the occult properties of the ductless glands> **3 a:** hidden from view: not able to be seen: concealed <the silica may appear in crystalline form ... or it may remain occult in the ground mass> **b** *archaic*: of or relating to lines drawn in dots or meant to be erased **4:** of, relating or, or dealing in matters regarded as involving the action or influence of supernatural agencies or some secret knowledge of them <deals in the occult arts> <an occult fortune-teller>." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1560 (1993).

Since neither the Supreme Court nor the Second Circuit have defined religion in the constitutional sense, this Court will apply the approach adopted by the Third Circuit, *Malnak v. Yogi*, 592 F.2d 197 (3d Cir.1979) (Adams, J., concurring), *adopted by Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir.1981), *cert. denied*, 456 U.S. 908, 102 S.Ct. 1756, 72 L.Ed.2d 165 (1982), and also applied by the Ninth Circuit. *See Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir.1996). The test devised by Judge Adams of the Third Circuit is as follows:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Africa 662 F.2d at 1032 (citing *Malnak*, 592 F.2d at 207-210). The "formal and external signs" listed by the court include: "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions." *Malnak*, 592 F.2d at 209.

Free Exercise Clause

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine

one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The government may not compel affirmation of religious belief, *see Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, 322 U.S. 78, 86-88, 64 S.Ct. 882, 88 L.Ed. 1148 (1944), impose special disabilities on the basis of religious views or religious status, *see McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 97 L.Ed. 828 (1953); *cf. Larson v. Valente*, 456 U.S. 228, 245, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, *see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445, 452, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119, 73 S.Ct. 143, 97 L.Ed. 120 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-725, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976).

In *School District of Abington v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963), the Supreme Court described the Free Exercise Clause as follows:

> Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of

the enactment as it operates against him in the practice of his religion.

Our Court of Appeals has applied this "coercion" test when analyzing whether a challenged practice within the field of public education infringes on a plaintiff's free exercise rights. See, *Smith v. Board of Education, North Babylon Union Free School District*, 844 F.2d 90, 92 (2d Cir.1988). The coercion can be either direct or indirect, *see Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), and must infringe on the Plaintiff's ability to receive an "important benefit" from the state at the expense of the Plaintiff's right to the free exercise his or her religion. *See Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981) ("[W]here the State conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."). In *Smith*, the only recent Second Circuit case adjudicating a free exercise clause challenge against the actions of a public school, our Court of Appeals did not reach the ultimate issue of whether the school's interest was overriding or compelling. In *Smith*, an Orthodox Jewish high school senior sought to enjoin the Defendant Board of Education from scheduling his high school graduation on Saturday, when he would be unable to attend due to his strict observance of the Jewish Sabbath.

844 F.2d at 91. The Court of Appeals held that since Smith did not have to attend graduation in order to receive his diploma, the school was not denying him an important benefit protected by the Free Exercise Clause. *Id.* at 94.

At issue in this litigation is both the students' right to exercise their own religious beliefs free from state coercion, as well as the right of the parents to control the religious upbringing and training of their minor children. *See Wisconsin v. Yoder*, 406 U.S. 205, 230-231, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In analyzing the coercive effect the challenged conduct has on the Plaintiffs, it is improper for the Court to evaluate the sincerity of an individual's religious beliefs, *see United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 88 L.Ed. 1148 (1944), however, the Court is required to inquire into the relative importance of a particular religious ritual and degree to which exercise of that practice is infringed by government action. "The state may, however, justify any such limitation on religious liberty by showing that its action is essential to accomplish an overriding or compelling governmental interest." *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 868-69 (2d Cir.1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 833 (1989).

Specific Claims of Plaintiffs

As noted earlier, the proof at trial fails to confirm the existence of any "Bedford Program." There may be a "Bedford Attitude" which is negative towards the desires of Plaintiffs to permit their children to opt out of specific programs or school practices they deem hostile or

offensive. At most, Plaintiffs' evidence shows a large number of separate claims of Constitutional violations, some of them trifling, which this Court must resolve on the facts and the law as separate controversies. As to some of them, the proof fails to support the allegations. Others present random acts initiated by individual teachers or others, which were not directed or authorized in advance by school district policy, but are now defended as of extreme significance to a broadened education. We consider them separately below.

Magic--The Gathering

"Magic: The Gathering" (Defendants' Exhibit 7) is a strategic, adventure-style, math-oriented, card game that was played by students at the Pound Ridge Elementary School and the Fox Lane Middle School as part of extracurricular clubs. Students were permitted to play the game on school premises only as part of clubs that met before school started at the elementary school, and after school at the middle school. Participation was allowed only with prior written parental consent, and the school made a reasonable effort to provide adequate information to permit parents to make an informed decision (Defendants' Exhibit 27). The clubs were supervised by a parent at the elementary school and by a teacher at the middle school. These supervisors were in attendance strictly for safety reasons, and did not take part in the activities of the clubs. Following plaintiffs' initial complaints about the game, the school district placed a thirty day moratorium on the activity until the district could make a more informed

decision about the nature and content of the game. After receiving the opinions of several mental health professionals, the school district lifted the moratorium.

However, the game is not played currently at either school. Dr. Dennis testified that the clubs would be reinstated only if the students expressed interest in resuming the activity. (Tr. 345). Only acting upon such a request, would the school district then attempt to obtain adult supervision. The middle school teacher who supervised the club has since retired and the parent who volunteered has found employment and is no longer available. *Id.* The school district asserts the right to reinstate this extracurricular activity at any time if it decides to do so, and asserts that playing the game improves math and other skills.

Dr. Dennis testified on direct examination (Tr. 341-42):

> Q. (By the Court) What do you understand the purpose of the game to be?
>
> A. The game is a game that's based on mathematical principles and contains images on cards which ostensibly have some power that gives the student or the child who is manipulating the cards the ability to gain his opponent's trading cards in return.
>
> Q. (By the Court) Is there some written direction about how you play the game?

A. Yes, there is extensive direction, and there are books. This is a game that's been played on college campuses. Mensa had selected it as one of its top ten games during the year that it came out, and it's a game that typically attracted the most academically talented kids. They seemed to be drawn to the game. But I have no particular fondness for the game itself.

Q. (Direct examination) Isn't it true that your own son tried to teach you the game?

A. My own son played the game. It was beyond me. But yes, he did try to teach me.

Q. You don't really know how to play thegame, do you?

A. I've watched the game played. I've watched students in the school. When I placed a moratorium on the game because the plaintiffs had contended that the game was harmful, I sent for materials from the publishers so we could provide them to the mental health professionals who reviewed the game. I reviewed the game. I had six middle school boys come to my office to let me observe them while they played the game. I have been to a tournament that was held in a church in Bedford where the game was played. So I have a rudimentary understanding of the game, and I've certainly seen all the images on the cards in the entire series.

The Court, like Dr. Dennis, finds the game of "Magic: The Gathering" somewhat arcane to say the least. It was first published nationally in 1993 by Wizards of the Coast, Inc., located, naturally, in California, and is now in its 6th Edition. Defendants' Exhibit 1 is a game set for two players, which includes two sets of playing cards. One player is designated the Wizard Zakk, and the other Wizard Kazz. A player starts with the life total of 20, and wins the game when he or she has reduced the other player's life to 0. There are other versions for multiple players, including 16 expansion sets and 6 versions of the base game.

Drawing certain cards allows a player to cast different types of "spells" including the ability to summon Sprites or a Unicorn. The directions for the resultant one-to-one combat between the players are both intricate and weird. To describe them would prolong this work unduly. The cards include graphic illustrations of zombies, goblins, a lost soul, elven riders (mounted on wolves), "artifacts," a sorceress queen, a wraith, an imp, murk dwellers, vampires, a wall of human bones, a whirling dervish, a unicorn, a skull, Pegasus, a grizzly bear and some other cards which are entirely free from references to the supernatural. No reasonable person could regard sponsoring this game as a teaching of religion.

Although it has been stipulated that "Magic: The Gathering" contains cards that are offensive to people of the Catholic faith, this Court declines on the totality of the evidence to find that the school district's conduct was in violation of the First Amendment. The game is played

with a large number of cards containing unrealistic fantasy representations, which are obviously fictitious and imaginary, but it is neither overtly nor implicitly religious. As the game itself is not religious in nature, Plaintiffs' argument that the Defendants by allowing this extracurricular activity are advancing or promoting Satanism as a religion or the occult also fails. Furthermore, since participation was voluntary and permitted only with written parental consent, and not during school hours, this Court finds that the school district neither asserted coercive pressure for students to participate in the game, nor did it infringe on plaintiffs' right to the free exercise of their religion.

Assuming, solely for the argument, that Magic: "The Gathering" was religious in nature, the evidence shows, and the Court finds, that no reasonable observer or participant could believe that the school district's actions communicated a message of endorsement of the beliefs, if any, contained within the game. To the contrary, the school district's precautions to present the club as a mere extracurricular activity not endorsed by the school, but simply offered on school grounds not during school hours, is consistent with the Supreme Court's decisions on the interplay between the competing principles of Free Speech, Free Exercise, and Establishment clauses of the First Amendment. *See e.g. Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

Lord Ganesha

Mrs. Reizes, during her fourth grade class in 1992-93, read her students the story, "How Ganesha got his Elephant Head," (Plaintiffs' Exhibit 31), then had her students construct likenesses, in paper, (Plaintiffs' Exhibit 12) of Ganesha.[8] Plaintiff Krystal DiBari was in Mrs. Reizes' fourth grade class in 1992-93.

The fourth grade lessons were part of a school-wide international enrichment theme week in which the teacher of each class selected a country for students to study and then share their experiences with students in the other classes. Mrs. Reizes chose to teach about India because the goal of the enrichment week was to supplement the curriculum with music, art, dance, and cooking and she believed India provided an interesting culture that would lend itself easily to such goals with the use of craft projects, background music, and the like. Mrs. Reizes established an elaborate lesson plan and classroom environment to foster the learning of the Indian culture, not the Hindu religion. The classroom was decorated with several travel posters of India and textiles and fabric of Indian design. Lessons on geography and culture were complimented with activities

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8. Ganesha, an elephant-headed Hindu God, is a subsidiary figure in modern Hinduism. He is the first god invoked at the beginning of worship or a new enterprise, and his image is often seen at the entrance of temples or houses. He is a patron of letters and learning and is considered the remover of obstacles. A festival for celebrating his birth falls on the fourth day of the lunar month Bhadrapada (August-September) and is observed with particular enthusiasm in the state of Maharashtra. 5 THE NEW ENCYCLOPAEDIA BRITANNICA 109-110 (15th ed.1995).

such as: instructions on how to make batiks (regional hand-printed textiles) out of wax and dye; cooking Indian food based on recipes in a Time-Life Cooking of India cookbook; making paisley designs (as paisley originated in Kashmir, India); constructing mosaics out of beans (Defendants' Exhibit 13); and replicating an Indian board game (Defendants' Exhibit 14). One afternoon (Tr. 666) was spent reading the story "How Ganesha got his Elephant Head." (Plaintiffs' Exhibit 31). This reading was followed by a companion art & craft project of constructing a paper image of Ganesha.

In 1993-94, Mrs. Reizes conducted a social studies unit on India as part of her third grade class. Plaintiffs Joseph DiNozzi and Tiana DiBari were a part of this class. The New York State Education Department Third Grade Social Studies curriculum, "Communities Around the World," (Defendants' Exhibit 20), provides specifically for a unit on Bombay, India (now Mumbai) (Defendants' Exhibit 20 at p. 225). This prototype unit discusses the Ganesha festival as a "tradition[ ] that Bombay's people are intent on preserving." *Id.* A suggested curriculum reading is "The Story of Rama and Sita," which is an excerpt from one of India's greatest writings, the epic poem called *The Ramayana*. *Id.* at 226, 229.

One of the suggested follow-up exercises to the reading of this story is the making of monkey stick-puppets, based on the Monkey King who is a hero in "The Story of Rama and Sita." *Id.* at 233. Mrs. Reizes herself decided to substitute the story, "How Ganesha got his Elephant

Head," (Plaintiffs' Exhibit 31) for the "The Story of Rama and Sita," and modified the follow-up exercise from the monkey project to a project of constructing an image of *383 Ganesha out of clay.[9] The evidence at trial confirms that this project was never started, as the school day ended before the class could begin construction; the project was disregarded the next day. (Tr. at 97, 105-107, 144-145) The Court finds no credible evidence to support plaintiffs' claims that Mrs. Reizes instructed the students to bring food or other gifts to Ganesha.

Mrs. Reizes also displayed in her classroom handwritten signs and pictures of Ganesha, one of which reads as follows:

> Ganesha's head was accidentally cut off when he was a child. Shiva, in a panic, replaced it with the first head he found—an elephant's head.[10] Ganesha is a round-bellied, good-natured Hindu God. He loves to eat. Those who worship Ganesha bring him gifts of fruit. Ganesha is the god of wisdom and

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9. According to legend, Ganesha was made of clay by his mother Parvati, a Hindu goddess and wife of Shiva.

10. This part of the story was factually incorrect. Shiva's attendants cut off Ganesha's head in battle. To ease Parvati's grief Shiva promised to cut off the head of the first living creature that he came across and join it to the body. This was an elephant. *Encyclopedia Britannica,* cited *supra.*

> success. People pray to him before they begin important projects.

(Plaintiffs' Exhibit 31).

Contrary to Mrs. Reizes testimony, her substitution of the story, "How Ganesha got his Elephant Head," (Plaintiffs' Exhibit 31) for the "The Story of Rama and Sita," plainly is not suggested by the New York State curriculum (Tr. 642, 653). These lesson plans were not part of the official New York State curriculum, but rather, like so many of the other challenged "Bedford Program" activities, are the product of one teacher's unilateral and idiosyncratic decision to do something, without prior consultation with or direction by the Superintendent, the Principal, or the School Board.

The evidence supports, and the Court finds, that Mrs. Reizes' only purpose in teaching about Ganesha was to educate her students about the Indian culture and society. Although Lord Ganesha is a deity of the modern Hindu religion worshiped by hundreds of millions of people, reading a story common to the Indian culture, as part of an innovative, structured lesson plan about a foreign country and its culture, does not have the purpose or effect of advancing or inhibiting religion. Hinduism has religious, social, economic, literary and artistic aspects that combined form an intricate part of the Indian culture, knowledge of which is beneficial to the students and consistent with a diverse educational experience. Considering the relative amount of time that Mrs. Reizes spent on reading the

Ganesha story, this challenged activity should be seen as neither advancing or promoting the Hindu religion, but simply educating students about the Indian culture. *See Abington v. Schempp*, 374 U.S. at 225, 83 S.Ct. 1560 (study of religion as part of secular program of education is consistent with the First Amendment). Likewise, in the context in which the story was read, the Court finds no indicia of any subtle coercive pressure to engage in the Hindu religion.

This subtle coercive pressure is found, however, in the classroom projects of constructing images of Ganesha. It is merely fortuitous that the third grade students never actually made the clay images of Ganesha, as instructed, because they ran out of time. While reading the Ganesha story can be part of a neutral secular curriculum, this Court fails to find any educational justification for telling young impressionable students to construct images of a known religious god. This part of the lesson, however benign in purpose or intent, has the appearance to a child of that age that the school is communicating a message endorsing Lord Ganesha and the Hindu religion. Equally impermissible under the First Amendment is the subtle coercive pressure of instructing young impressionable students to make images of a god other than their own in violation of their religious beliefs. Father Pacwa testified, without contradiction, and reported in Plaintiffs' Exhibit 73, that it is a violation of the First Commandment and Catholic

teaching, for Catholics to fashion images of false gods.[11] Thus, this practice is a violation of the First Amendment and plaintiffs are entitled to appropriate relief on this point.

It should be simple to draw and conform to a line between the two challenged activities concerning Lord Ganesha. Permitting a school teacher to read a religious based story to students as part of a secular program is far removed from directing the same students to create a likeness or graven image of a god. The apparent benign appearance of the paper Ganesha image that was constructed in Mrs. Reizes' class (Plaintiffs' Ex. 12) is of no relevance. Of course a teacher, without violating the Constitution, could instruct her class to make a paper image of an elephant after the class reads the story of Babar or Dumbo. At issue here is not a "silly,"[12] third grade level image of an elephant with a crown (Plaintiffs' Ex. 12) but rather a teacher instructing or encouraging a student to

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11. I am the Lord thy God, who brought thee out of the land of Egypt, out of the house of bondage. Thou shalt not have strange gods before me. Thou shalt not make to thyself a graven thing, nor the likeness of any thing that is in heaven above, or in the earth beneath, nor of those things that are in the waters under the earth. Thou shalt not adore them, nor serve them. I am the Lord thy God, mighty, jealous, visiting the iniquity of the fathers upon the children, unto the third and fourth generation of them that hate me. And shewing mercy unto thousands to them that love me, and keep my commandments. First Commandment, in *Exodus* 20: 2-6, 1941 Douay Tr.

12. Testimony of Dr. Dennis (Tr. 463).

construct an image of a religious deity worshiped today by many. In contrast, the Monkey King featured in the exercise initially suggested by the New York State curriculum and rejected by Mrs. Reizes does not appear to have any religious significance.

The Court concludes that appropriate relief is warranted based on the fact that the school district fails to recognize the severity of this violation. Dr. Dennis, the Superintendent, testified that he believes that it is unreasonable for parents to object to having their children instructed to make images of a religious figure in class. (Tr. at 351). Likewise, James Young, the principal of the Pound Ridge Elementary School during the relevant time frame of the challenge activity, testified that he had no problem with third and fourth graders making images of a Hindu god in class. (Tr. at 304, 317). The Constitution provides otherwise.

School Sponsorship of the Worry Dolls

There are five Worry Dolls in evidence as Defendants' Exhibit 1. These were sold at a school store. The Worry Dolls are about 1 1/4" high and appear to be made out of toothpicks, thread and wire, painted in bright colors, and put together with glue, with a painted face. In addition, Worry Dolls were made and painted by the students under school sponsorship as projects in the Discovery Center at Pound Ridge Elementary School. When Joseph DiNozzi was in the 4th grade, he made Worry Dolls and personnel in the school store told him and other students that if they

put the dolls under their pillow at night, "[i]t would chase away your bad dreams." (Tr. 91)

Ross Altman testified that in addition to the operator of the school store, a teacher Mrs. Reizes, told the students in class that they could put the Worry Dolls under their pillows, "and take all our worries away and, dream." (Tr. 284, 287) We note that Mrs. Reizes denied that she herself had anything to do with the Worry Dolls, but there is sufficient evidence that someone acting for the school district allowed the Worry Dolls to be made in class, and that they were available at the school store, and the students were informed as to their intended use. The business with the Worry Dolls is a rank example of teaching superstition to children of a young and impressionable age. It assumes that an inanimate object has some occult power to relieve us from worry and assure a good night's sleep. Father Pacwa testified, without contradiction, and reported in Plaintiffs' Exhibit 73 that the use of charms is forbidden by scripture and is an offense against the First Commandment. As Father Pacwa testified, "[t]he recent Catholic Catechism ... [prohibits] all forms of divination, magic and sorcery." (Tr. 600).

The sponsorship by the school of the Worry Dolls by selling them in the school store, or encouraging students to make them in class or in the discovery center, and use them for relief from worry, is a violation of the First Amendment. It prefers superstition over religion. Plaintiffs are entitled to appropriate relief on this point.

Yoga Exercises

Although yoga practices are widely accepted in the western world, simply for their exercise benefits, Plaintiffs take the position that yoga originates as a practice of the Hindu religion and is a form of idolatry.

Yoga exercises were conducted at the school by the witness Agia Akal Singh Khalsa, who is a Sikh, and testified at trial (Tr. 431, *et.seq.*) Sikh Khalsa has a trademark name of "the Yoga Guy." Sikh Khalsa also has a web site and practices numerology, an occult practice with religious overtones, having to do with purported analysis of the cycles and transit patterns of a person's life. Sikh Khalsa went only to the high school, not the elementary school. He was retained by Ken Edwards, the Athletic Director, and apparently came into the program as the result of another random act initiated by an individual teacher, without any prior consultation on the part of the Principal, the Superintendent, or any action or approval by the School Board.

Sikh Khalsa testified, and I find that in hiring him Mr. Edwards made clear that he "wasn't there to teach anything more than a stress reduction exercise." The evidence at trial fails to show that the Yoga Guy made any effort to teach religion or foster any religious concept or idea connected with Yoga. It was simply a breathing and relaxation exercise presented by the witness, who arrived at school dressed in a turban and the customary garb of a Sikh

minister. There is evidence that Plaintiffs' children, on request, were allowed to opt out of the yoga exercise.

The Court finds as a matter fact that on the totality of the evidence, although the presenter was dressed in a turban and wore the beard of a Sikh minister, he did not in his yoga exercise presentation advance any religious concepts or ideas. There was no Constitutional violation, and as noted, in any event, Plaintiffs and others were permitted to opt out. Plaintiffs are entitled to no relief in connection with their claims concerning the yoga exercise.

Crystal Power

Plaintiffs claim that during a demonstration at school, elementary school children were told that crystals (rocks) had supernatural powers and could affect their mental state and heart rate. This practice is said to constitute a fostering by the school district of practices of superstitionand idolatry in violation of Plaintiffs' rights under the Establishment Clause.

This claim arises out of a visit to the school by the witness Harvey Brickman, who describes himself as "the Rock Hound." He attended the Pound Ridge Elementary School on February 2, 1995, at Mr. Nolan's class, and at Ms. Hovey's class on the following day. He spoke to four different classes of fourth grade students. Here again, the presence of the Rock Hound is the result of a random act initiated by an individual teacher which seemed to have no basis in any policy determination by the school district, or

any decision by the Principal or the Superintendent. A teacher, Carol Hovey, attended one of Mr. Brickman's lectures on rocks and minerals, and asked him if he would give the same lecture at the school.

Mr. Brickman, a retired financial analyst with General Electric, is a rock collector and a member of clubs consisting of others interested in rock collection. He wears a fancy vest, which identifies him as a member of the Stamford Mineralogical Society, and his clothing is festooned with pins, rocks and other indicia of his avocation which he has collected over the years. The purpose of the Stamford Mineral Society is the collection of intelligence about rocks, minerals and fossils. This includes the collection of crystals, which he describes as pure rocks having varying characteristics. He has given between fifty and one hundred similar presentations at schools and in doing so has followed substantially the same script.

Mr. Brickman testified, and I find, that he gave a traditional presentation of information concerning various minerals, their relative hardness, and some other characteristics and also made available samples of rocks which he had collected to be examined by the students.

Some of the students brought their own rock collections to class, and he helped identify rock samples. Students were allowed to touch the rocks, and to wear jewelry containing certain of the rocks. The exhibition included amethyst crystals, tourmaline crystals, garnet, and beryl crystals, and he wore a necktie with pyrite. He denied that

he himself believes that crystals have supernatural powers, and expressly denied under oath the accusation that he had told the students that putting a crystal next to their heart would make their heart beat faster (Tr. 729). Mr. Brickman testified in response to the question, "Did you tell the children some people believe that crystals have power?" by answering as follows, "I may have been asked if I thought that crystals had powers, and I may have told them some people believe it, but I thought it was ludicrous." (Tr. 731) This was not a part of the planned presentation, but the witness testified that if asked he would have so responded. He concedes that he has given out samples of crystals to the children.

Father Pacwa's testimony to the effect that Roman Catholics are forbidden to engage in the practice of using crystals as if they had mystical power over the body is undisputed. Also undisputed is his opinion that "such superstition is a form of idolatry, which is a grave sin." There is, however, a failure of proof that the scope of the lecture went beyond telling the students that "some people believe." To describe the religious beliefs of some persons without endorsing those beliefs does not violate the First Amendment. The Court notes that throughout the case Plaintiffs have relied upon the recollection of young students of impressionable age as to single events in their lives which occurred several years earlier and were the subject of concerned discussion with parents, grandparents, guardians and lawyers over a lengthy period. Russell Altman testified that Mr. Brickman had said that if you put a crystal on your heart or on your forehead "you can wish

and want more and your dreams will come true." (Tr. 276). He was also quoted by the student as saying that the crystal around his neck was very sacred to him. The Court accepts Mr. Brickman's version as more worthy of belief. Indeed, the credibility of all students who testified on both sides of the case is suspect. Not because of their tender years, or because this Court believes they had a desire to lie, but because they are all interested in the outcome of the case, affiliated in some way with one side or the other of the case, and more importantly they are being asked to recall events in the past which obviously have been the source of considerable discussion and controversy both at home and in their dealings with the lawyers.

Under our legal analysis set forth earlier, the Court agrees that it would have been a violation of the First Amendment if the visiting lecturer, Brickman, had taught the students that the crystals have occult or supernatural power. He did not. Plaintiffs are entitled to no relief in connection with their claims concerning the Rock Hound.

The Life of Buddha

There was evidence that one teacher read to the students an account of the life of Buddha. The argument by Plaintiffs is that "[i]f public school children cannot be shown a video of the life of Christ they cannot be read the life of Buddha by their own teacher." (OPCAL, Doc. No. 66, filed February 22, 1999.)

In the first place, it is not clear that public school children could not be told of the life of Christ. Certainly it could be done lawfully without sponsorship, merely as an exercise in history or for the study of comparative religion. There is a failure of proof that reading the life of Buddha was conducted in such a fashion as to sponsor belief in Buddha or to violate the First Amendment rights of Plaintiffs. Absent a promotion of religion by the school, it is permissible to read the life of Buddha to the students. Plaintiffs are entitled to no relief in connection with their claims concerning Buddha.

Quetzalcoatl

Fourth grade students were read a story about Quetzalcoatl that was part of a historical presentation concerning Mexico. There is no evidence that the teacher, Mrs. Pappace, who testified at trial, promoted belief in Quetzalcoatl as a religion. One of the students made a Quetzal Bird out of cardboard, paper and pipe cleaners, and a diorama was made showing human sacrifice by the Aztecs.

On the balance of the evidence, the Court concludes that no student was compelled to make a physical representation of Quetzalcoatl, that the teachings were consistent with the New York State curriculum and represented a comparative presentation of ancient religious customs consistent with the purpose of the instruction. Unlike Lord Ganesha, Quetzalcoatl is not currently worshiped in the world and

hanging the Quetzal Bird in class should not be regarded as the adoption of a religious symbol.

The students were told that some persons believe Quetzalcoatl will return to the world in the year 2012, but telling students "some persons believe" is not the same as sponsoring that idea in the minds of the children. There is a failure of proof of a First Amendment violation in connection with the teaching of historic Mexican culture. Plaintiffs note that the teacher, Mrs. Pappace, gave no attention "to the study of the Catholic religion, which the people of Mexico have practiced for the past 500 years." The Court has no jurisdictional basis to require that the school district, having taught the children of the historical existence of the Aztecs, their legends and their religion, must also teach the children concerning the later adopted religion of Mexico. Plaintiffs are entitled to no relief on the issue of Quetzalcoatl.

"How God Messed Up"

Fourth graders in Mrs. Hovey's class were allowed to write original poems of their own choice, and the product was published in booklet form (Plaintiffs' Exhibit 56, "Poetry by 4-H"). Mrs. Hovey did not assign topics for the poem, and the poems represented the individual and original work of the students. Selections of the work to be included in the booklet were made by the students themselves. The first student poem reads as follows:

God messed up ...

When He made cats
He gave them the brains of bats
With bloated legs and pointy ears
and some claws
Made of SPEARS.
By Gary Palmer, Jr.[13]

Another poem in the same publication, with the name of the student obliterated, but apparently not written by Gary Palmer, Jr., is entitled "Mess Up." It reads:

"God messed up when he made dogs
He gave them the brains of frogs (tiny)
He gave them deformed bodies and
Really shrimpy legs and hands
And bushy tails and butts, PU
Guess what, He messed up on frogs, too."

The reasonable person or child reading the book of poems would assume that the authors meant it to be funny. The inclusion of these poems on a subject not dictated by the teacher does not constitute the endorsement of an anti-religious message, and indeed it is not certain that the

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13. Gary Palmer, Jr. had another equally banal poem published in Exhibit 56, "Poetry by 4-H" :

"There once was a fatman
who lived in a trash can
who outran Pac Man
all the way to Spokane."

message is intended to be anti-religious. The poetry may have been inspired by "Ma and God," a poem for children written by Shel Silverstein (deceased May 10, 1999), a distinguished humorous poet for children writing in the tradition of A.A. Milne (Plaintiffs' Exhibit 77), also apparently intending to be funny.[14] Without endorsing any of the poetry, the Court does not perceive that this evidence arises to the level of a promotion or disparagement of a religious concept. Nor does the Court agree, as Defendants claim that an effort by the teacher to leave the poems out of the booklet "would itself have raised Constitutional concerns." (Defendants' post trial brief at 14). No First Amendment violation is found in connection with this very poor poetry.

The Cemetery Visit

With advance written parental consent, the fourth grade students participated in an overnight field trip to the Madden Outdoor Education Center, a facility located in

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14. Silverstein contrasts what Ma says with the actions of God, *e.g.* "God gave us fingers--Ma says "Use your fork." God gave us puddles-- Ma says "Don't splash," and after other examples, concludes that "And I ain't too smart, but there's one thing for certain-- Either Ma's wrong or else God is." Shel Silverstein, *Where the Sidewalk Ends* 119 (New York 1974).

Putnam County operated by BOCES.[15] Plaintiffs' Exhibit 33 is entitled "A Guide to Overnights at Madden." Students and counselors were allowed to camp out overnight and to cook outdoors in a permitted area. The Madden program sponsored by BOCES is an educational program availed of by various school districts in Westchester and Putnam Counties. Its purpose is to allow children and adults to "see one another in new and surprising ways away from the classroom environment" and it seeks to develop group identity and improved communication skills and helps students grow in their ability to take initiative and offer opinions, etc. The program is planned and run by the Madden staff, and includes orientation, instruction in compass use, cemetery/local history experience, evening program on Hudson River lore, and campfire. This program is consistent with the New York State Social Studies curriculum and Science curriculum. The trip to Madden was presented to the parents for approval as representing "plenty of opportunities to take risks: in a safe environment." Parents were invited to go along as monitors.

Exhibit 33 refers to cemetery study as follows:

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15. BOCES is the Board of Cooperative Educational Services which serves Putnam and Westchester Counties.

> Cemetery Study: (2 hour/1 class) This program invites students to travel back to the early 1800's to learn what life was like for the settlers of the Madden property. After a brief discussion, students hike to the cemetery to collect data from the gravestones. This data is then used as a basis for a discussion which covers nutrition, food preservation, lifestyle, human physiology, family trees, disease, and family responsibilities. The discussion includes math, science and social studies skills. Following a discussion, each student does a gravestone rubbing. If your group does not have enough time for a full cemetery program, choose the *gravestone* rubbings program described below.

The Madden program contains a number of highly worthwhile opportunities for young children which lack any religious significance. The policy and operation of the Madden Center was not determined by these Defendants, but was under the control of BOCES, a different organization.

Plaintiffs claim that during the overnight trip an employee of BOCES wandered around the campground "waving a stick to magically ward off the danger of animal attack." (Tr. 152). Some of the students believed that there were wolves or bears, and that the stick waving would ward them off. Assuming for purposes of this case that the practice constituted a teaching of a superstitious belief that waving a stick would ward off wild animals, this effort was

not an activity for which these Defendants can be held responsible.

As an additional claim arising out of the visit to Madden, the Plaintiffs showed that Ms. Dorna Schroeter, an employee of BOCES, asked one of the students, not a plaintiff in this lawsuit, to lie down on a grave in the Knapp family cemetery. Bedford teachers were present and did not express disapproval or interfere when this other child laid down momentarily on the grave. Other children were permitted to take rubbings from the inscriptions of old tombstones by use of paper and a crayon.

Defendants assert that the activity in the cemetery, especially lying down on the grave, which to this Court seems terminally dumb, was an appropriate teaching practice for social studies because lying down on the grave would show that a full grown person in Colonial times was of much shorter stature. Plaintiffs assert that lying down on the grave involves a desecration, and apparently oppose taking rubbings from tombstones, although this practice is commonly encouraged in the great cathedrals of Europe.

While the educational experience of lying down on a grave seems of doubtful value to the Court, we do not perceive a First Amendment violation by the Defendants of the rights of any of the Plaintiffs by reason of any of the activities which occurred at Madden. Ms. Schroeter was not claimed to be a school district representative. Mere silence on the part of the observing teachers would not constitute a ratification by them or by the school district,

and participation in the overnight visit was by parental permission only, and therefore Plaintiffs could opt out. We note that Plaintiffs' Exhibit 33 does warn parents of the intention to have children take rubbings from the tombstones. For the foregoing reasons, Plaintiffs are entitled to no relief with respect to this claim.

The DARE Program (Drug Abuse Resistance Education)

Plaintiffs attack the DARE program as a violation of the First Amendment, the Pupil Protection Rights Amendment--20 U.S.C. § 1232h, and *New York Public Health Law* § 2504. Plaintiff Jon DiNozzi participated in the DARE Program in fifth grade at Pound Ridge Elementary School. The program was sponsored by a police officer, trained for the purpose. Jon DiNozzi testified:

> Q. Tell the Court what the program consisted of.
>
> A. Well, [Officer Roffi] went through the different kinds of drugs, what they were, the good consequences and the bad consequences. There never was a 'say no to drugs.' It's your choice, we hope you make the right choice.

(Tr. 28).

The student testified that he was not told by the police officer or anybody else as part of the DARE Program that drugs were wrong. Steven DiNozzi testified that he participated in the DARE Program in fifth grade before he was opted out of the program by his parents. Steven testified that there was role playing in a drug transaction,

and one of the students played the part of the drug seller. The police officer had a "DARE box" where if a student had comments or questions he or she did not want to ask in front of the class the question could be placed in the box.[16]

Officer Roffi, a member of the Mt. Kisco Police Department, testified as part of the Defendants' case. Officer Roffi has been a DARE instructor since 1991, and has served in a number of different schools in Westchester County. She is a certified instructor of the Division of Criminal Justice Services Bureau for Municipal Police of the State of New York, and has completed 80 hours of classroom work. DARE instruction is given in accordance with a copyrighted published curriculum. The DARE Student Workbook for grades 5-6 is in evidence as Defendants' Exhibit 23.

Obviously, reasonable persons could disagree as to the effectiveness of the program and it seems there is no tangible evidence as to whether or not it works. The program is criticized because it does not involve telling the children that drugs are morally wrong. The DARE Program appears to present, as testified to by Officer Roffi, a strong drug and strong anti-violence message (Tr. 786), but apparently is designed to require the students to receive the message by inference rather than by direct statement of the teacher. The purpose of the role playing is said to assist students to learn how to say no, when being pressured by

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16. At St. Patrick's parochial school, which serves the same geographic area, the DARE Program was also given, and the students were able to opt out (Tr. 77).

their peers to try tobacco, alcohol and drugs, and the role playing is done so as to give the students the opportunity to say no to an offer by a member of the peer group, thus practicing to say no in a safe environment. (Tr. 789). Contrary to the testimony of the students, Officer Roffi testified that she does explain to the students that the law prohibits the use and possession of illegal substances. (Tr. 795)

It is apparent that the DARE Program is relatively free of moral overtones, contains no religious emphasis whatsoever, and leaves the "decision" whether or not to use tobacco, alcohol or drugs to the student after evaluating both positive and negative effects. The witness Roffi testified without contradiction that usually the students conclude and verbalize the fact that "under the not using side all of the consequences are positive, under the using side they are all negative." (Tr. 796). She says that students do not find positive responses to the use of the substances. Stressors are discussed and include the possibility of family pressure.

In addition to their First Amendment based challenge, Plaintiffs challenge the DARE program as a violation of the Pupil Protection Rights Amendment (PPRA), 20 U.S.C. § 1232h. This Court agrees with Defendants' initial response to this claim, that neither the plain meaning of the PPRA nor the Congressional intent behind the statute provide an implied private right of action. *See McClellan v. Cablevision of Connecticut, Inc.*, 149 F.3d 161 (2d Cir.1998); *Herbert v. Reinstein*, 976 F.Supp. 331, 339 (E.D.Pa.1997) (finding no implied private right of action under 20 U.S.C. § 1232h).

Notwithstanding this conclusion, however, a private right of action exists by reason of 42 U.S.C. § 1983 for the violation of a federal civil rights statute even where the statute does not provide an express or implied private right of action. *See Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). The Supreme Court has provided a three prong test to determine whether a federal statute gives rise to a federal right enforceable under § 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

King v. Town of Hempstead, 161 F.3d 112, 114 (2d Cir.1998) (quoting *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 1359, 137 L.Ed.2d 569 (1997)); *see also Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

In determining whether plaintiffs are intended beneficiaries of the provisions of 20 U.S.C. § 1232h, the first prong of this test, the Court looks to the plain text of the statute, which provides, in relevant part, that "[n]o student shall be required, *as part of any applicable program,* to submit to a survey, analysis or evaluation that

reveals information concerning.... (2) mental and psychological problems[,] ... without the prior consent of the student ... or ... parent." 20 U.S.C. § 1232h(b) (emphasis added). Section 1221 of the General Education Provisions Act, which includes the PPRA, defines the term "applicable program" as "any program for which the Secretary [of Education] or the Department [of Education] has administrative responsibility as provided by law or by delegation of authority pursuant to law" and "includes each program for which the Secretary or Department has administrative responsibility under the Department of Education Organization Act [20 U.S.C.A. § 3401 *et seq.*] or under Federal law effective after May 4, 1980." 20 U.S.C. § 1221(c)(1). The Department of Education explicitly interprets the PPRA to apply only to schools that receive and use federal funds, from the Department, in connection with the use or administration of surveys, analysis or evaluations concerning one or more of the areas listed in the PPRA. *See* 60 Fed.Reg. 44,696 *et seq.* (1995) (to be codified at 34 C.F.R. pt. 98).

As the evidence is undisputed (Plaintiffs' Exhibit 74) that no federal funds were used in the DARE program, the Court holds that plaintiffs are entitled to no relief under any of their claims asserted pursuant to the PPRA.

Plaintiffs contend that the DARE program is a health service under *New York Public Health Law* § 2504, which requires the district to obtain parental consent as a prerequisite for student participation. Plaintiffs' expert witness Dr. Coulson testified that participating in the DARE Program constitutes non-directive psychotherapy. He criticizes the program as, "[t]he idea is to provoke children

who are not aware of having a problem with respect to drugs, children for example, who may have been reared under an absolute morality where they are taught 'don't even think about doing drugs' to provoke them into thinking about doing drugs and give them what purports to be a method for deciding for themselves whether or not to deal with drugs." (Tr. 485). This Court is not required to resolve the validity or the desirability of the DARE Program. We note that the program has been in common use throughout the country for some period of time without having been found unlawful by any court. It may well be that there are better ways to teach abstinence from illegal drugs, but the evidence does not support a conclusion that the DARE Program is a "health service" within § 2504 of the *New York Public Health Law*.

No First Amendment or other violation appears to have resulted from the DARE Program. Plaintiffs are entitled to no relief as to this issue.

Reverend Nancy Weber

Rev. Nancy Weber is a self-proclaimed psychic, although her psychic powers did not extend to predicting the date on which the trial testimony would be concluded. She is a minister in the Life Spirit Congregational Church. She conducted an activity at the elementary schools intended to improve creativity, learning and memory. This involved exercises intended to improve the function of the right hemisphere of the brain, which Rev. Weber believes can be stimulated and improved. She led the children in exercises of concentration with eyes closed.

Here again, Rev. Weber's appearance at the school was as a result of a random act, and not a part of any designed curriculum and did not involve any decision making by the Superintendent, principal, or the Board of Education. She met the school nurse at a social function in New York or Connecticut at somebody's house. As a result of a chance social conversation with the school nurse "about health and learning and research supports that there is an integration between a healthy body and the ability to learn and be less stressed while you are learning," she was invited to attend as a guest lecturer and conduct exercises.[17] The subject of her teaching was that "the right hemisphere of the brain is the part that takes all the complex patterns and makes associations allowing us to grasp concepts which I believe helps us learn anything." (Tr. 399). The exercise included having the children draw with the non-dominant hand with their eyes closed.

Plaintiffs have produced no evidence that Rev. Weber, during her brief visit to the school, taught any religion or performed intuitive counseling, exercised her psychic powers or engaged in telepathy. The argument is that "the attempt to perform right brain stimulation constitutes an invasion of privacy of the minor Plaintiffs and their parents." In Father Pacwa's expert report (Exhibit 73) he observes that "the notion that one's right brain must be

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17. Notwithstanding the casual method by which Rev. Weber found her way into the instructional program, she was paid a modest stipend from school district funds for her time and travel, as were the Yoga Guy and the Rock Hound.

stimulated so as to overcome 'linear thinking' with the left brain is quackery."

The entire Nancy Weber lecture may well have been nothing but humbug. However, the Court does not believe that this visiting lecturer required the students to engage in a "bogus mystical experience" as charged, and concludes that on the totality of the evidence it did not rise to the level of a First Amendment violation. Plaintiffs are entitled to no relief as to this issue.

Peer Facilitator Program

The school arranged for peer facilitators, students already attending the high school, to conduct orientation for students about to move from the middle school to the high school. Apparently these peer facilitations did not enjoy complete faculty supervision at all times, and students in the middle school met with more sophisticated students from the high school where they engaged in unsupervised discussion of such topics as sex, drugs, rock and roll music, parties and Monica Lewinsky. A role playing story about "Mark and Lisa" involving pressure to engage in sex was introduced into the discussion without faculty supervision.

This is claimed to be a psychotherapeutic technique in violation of the New York statute forbidding medical treatment without parental consent. The evidence reveals, and this Court finds, that the student-led discussions that occurred during the Peer Facilitator Program did not rise to the level of "medical" or "health services" within the plain meaning of the text of *New York Public Health Law* § 2504. Thus, the Court refuses to order the district to obtain

parental consent from students who participate in the Peer Facilitator Program. It is also alleged that the Peer Facilitator Program violates the PPRA, 20 U.S.C. § 1232(h). However, there is no evidence that federal funds were expended in connection with the program, so for the reasons stated earlier with regard to the DARE program, that claim must be rejected. No First Amendment violation is or could be claimed as to this activity. Plaintiffs are entitled to no relief with respect to the Peer Facilitator Program.

Meditation Programs

Plaintiffs object to other non-yoga meditation programs. The evidence showed that lights were turned off and students were asked to imagine themselves in a strange place, or that their bodies were filling with blue liquid, and were told to empty their minds. Plaintiffs contend that taped music was played and deep breathing was incorporated into the meditation period.

Plaintiffs contend first that this meditation constitutes a form of psychotherapy barred by the state and federal statutes discussed *supra,* unless consented to by the parents. Father Pacwa testified (Tr. 598) that this was a form of hypnosis. He objected first because persons without training in psychology were practicing hypnosis and was concerned on a religious issue because "letting people get involved in that kind of hypnotic exercise would introduce them to something either by suggestion psychologically or by actual spirit contact, and that would be evil."

The credible evidence in the case does not support a finding of actual spirit contact. The actual exercises may be useless, but do not rise to the level of a First Amendment violation and Plaintiffs have failed to show with respect thereto that they are entitled to any relief under the state or federal statutes discussed earlier.

Prayers to Mother Earth and the Earth Day Liturgy

This issue started out innocently enough. The New York State Legislature by statutory provisions going back as far as 1888 as amended from time to time has authorized the commemoration of "Conservation Day" on the last Friday in April of each year. Subparagraph 2 of § 810 of the Education Law now reads as follows:

> 2. It shall be the duty of the authorities of every public school in this state to assemble the pupils in their charge on that day in the school building, or elsewhere, as they may deem proper, and to provide for and conduct (1) such exercises as shall tend to encourage the planting, protection and preservation of trees and shrubs, and an acquaintance with the best methods to be adopted to accomplish such results, and (2) such lectures, pictures or tours, as shall tend to increase the interest and knowledge of such pupils in the fish and wild life, soil and water of the state.

The statute, in subparagraph 3, allows the Commissioner of Education to prescribe a course of exercises and instruction. Through the years, Conservation Day has come to be known as Earth Day. The worship of

the Earth is a recognized religion (Gaia), which has been and is now current throughout the world. The liturgy of Earth Day at Fox Lane High School according to all the evidence in the case, went far beyond compliance with *Education Law* § 810, and evolved into a proceeding which takes on much of the attributes of the ceremonies of worship by organized religions, including that of the Plaintiffs. Some of what was done was truly bizarre. Plaintiffs' Exhibit 28 is the April 1997 issue of the high school paper, *The Forum*. In reporting on the prior year's Earth Day ceremony, *The Forum* states, "[a]lso, as in every year, symbolic gifts were presented to the earth by the representatives of each class in the form of a speech." The ceremony included the erection of "symbolic structures," equal to an altar, and a chorus of drums playing throughout the presentations. The Earth was deified and students were urged to "do something that would make Mother Earth smile." The students assembled outdoors in a circle under the leadership of an art teacher, Dale Saltzman, who designed the program. A large (5 feet in diameter) globe was held up by three bamboo sticks in a green circle in front of the high school as a focal point of the worship service. In addition to a musical performance, several faculty members gave speeches.

As part of Exhibit 28, Plaintiffs presented a document issued March 5, 1996, by Mr. Saltzman. This memorandum pointed out with respect to Earth Day that, "[s]ome years the event has been small and quiet, and other years we have had great pomp and pageantry. At the core of each gathering has been and will continue to be an honoring of the earth as a home for all of us." The memorandum continues:

> The concepts enjoined and reinforced each year in the structure of the assembly itself are the Honoring of the Elders. Metaphorical gifts from the class officers to the earth and planting for the future. The program is always filled out with speakers, skits, demonstrations, dancers, drummers, poets or the like, with an ecological theme, but the core idea of respect for the earth is the concept to be driven home.

On at least one of the Earth Day celebrations, Mr. Saltzman told the assembled students and senior citizens who had become part of the ceremony that, "[w]e came from the earth, we are part of the earth, and we are all involved in this cycle. One day we will become [dead] and then we'll go back to the earth." (Tr. 25) This is clearly religious teaching. ("*pulvis es et in pulverem reverteris* " (Genesis 3:19)). Tombstones were used one year at the ceremony, inscribed with the names of extinct birds and animals. On one Earth Day occasion, Mr. Saltzman told the assembled group that there were too many people on this earth and we need to do something about it. The validity of this observation is far from clear, the Malthusians having failed to confirm their theory over two centuries.[18] It is directly contrary to the teaching of *Genesis I.*[19]

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18. Essay on the Principle of Population by Thomas Robert Malthus, 1798.

19. "God blessed them [male and female], saying: increase and multiply and fill the earth and subdue it, and rule over the fishes of the sea and the fowls of the air, and all living creatures that move upon the earth." 1941 Douay Trans.

To state this unproven fact as an absolute violated the school district's rule on academic freedom,[20] and involved the school district in teaching a doctrine directly contrary to the views of Roman Catholic students and many others. As Father Pacwa pointed out, "the implication would be that you would have to use some sort of birth control to stop this. Also it takes a stance, a moral stance, on what is the problem of the world today, namely, too many people, instead of dealing with other moral issues of more political nature that prevent food from getting to people that need it." (Tr. 593).

At times other than the Earth Day liturgy, the school sponsored prayers and the recital of a creed worshiping the Earth. Plaintiffs' Exhibit 62 is in two parts: a tape recording entitled "Listening to Nature," which intersperses prayers and invocations sonorously uttered along with background sounds of forest, and ocean; and a book entitled "Listening to Nature" by Joseph Cornwell (1987). The tape was played for an entire class of twelve and thirteen year old children. Contained is a creed: "This is what we believe. The Mother of us all is the Earth. The Father is the Sun. The Grandfather is the Creator who bathed us with his mind and gave life to all things. The Brother is the beasts and trees. The Sister is that with wings. We are children of the earth and do it no harm in any way, nor do we offend the Sun by not greeting it at dawn. We praise our Grandfather for his creation. We

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20. "Indoctrination of any matter of faith or opinion will not be tolerated." Plaintiffs' Exhibit 68 for *Id.* quoted by the witness Young (Tr. 328).

share the same breath together, the beasts, the trees, the birds and the man." This creed originates with the Taos Indians, and is a clear example of a religious teaching within Judge Adams' definition quoted *supra*. This activity was a direct presentation to the children of an Earth-centered religious belief. Further religious motifs are found in the book (Exhibit 62). While Mrs. Funari denied she made the book itself available to the students (Tr. 709), she conceded that the prayers in the book are on the tape played for the class (Tr. 711). At page 25 a poem entitiled "The Birds of the Air" contains the statement, "For this green earth is our Mother, hidden in the sky is the Spirit above." Clearly, this is also a religious teaching. Similarly, on page 65, children were advised, "When you need to cut down a tree or remove a plant from your garden, reflect on this prayer: 'We know that we all are children of the same Mother Earth, of our Father Sun. But, we also know that one life must sometime give way to another, so that the one great life of all may continue unbroken. So we ask your permission, we obtain your consent for this killing.' "This prayer is said to have originated also with the American Indians and is tendered to the children as "promoting understanding that our human desires should be tempered with willingness to defer to the needs of other living things." (Exhibit 62 at p. 65).

The children were also given a Winnebago Indian prayer: "Holy Earth Mother, the trees and all nature are witnesses of your thoughts and deeds." On the same page students were advised, "You can use the following prayer similarly: 'I feel Thy presence in this landscape which draws my heart so close to Thee.' " On page 68, children were confronted with the following: "The first peace,

which is the most important, is that which comes within the souls of people when they realize their relationship, their oneness, with the universe and all its powers, and when they realize that at the center of the universe dwells the great Spirit, and that this center is really everywhere, it is within each of us." Again, on page 71: "Trees, standing firm, hold the secret of inner power. Give us, when tested, strength to endure. Mountains, remote and still, hint at higher worlds unseen. So may our lives be, soaring and serene. Rivers seek passage, unhindered by rock or tree. So may our lives flow steadfast toward the sea! Mother, we thank you, your joy shines in everything! Open these channels, so the world once more may sing." Again, on page 72 the children were told: "Like the sage in the story, we can learn valuable lessons from nature. Nature is an expression of God; or, if you prefer, of the creative force and intelligence in the universe. Since we are created by the same power as nature, we can use nature as a mirror in which to reflect on truths about ourselves."

Although Plaintiffs did not call our attention thereto, Exhibit 62 includes, at page 74 near the end the well known prayer of St. Francis of Assisi. Notwithstanding St. Francis, the essential thrust of the book and the tape made from the book seems to be the promotion of Earth worship and prayer to the Earth, which offends both aspects of the First Amendment. Superintendent Dennis testified that he would bring a teacher up on charges if he or she told the children to pray to Ganesha or to the Worry Dolls. (Tr. 461). However, when confronted with the prayer to Mother Earth in Exhibit 62, he testified:

Question: [Y]ou remember the prayer, Pray to Mother Earth talked about not offending the sun, did you hear that prayer?

Answer: Yes.

Question: Should that prayer be said in a public school?

Answer: I didn't have any problem with that.

* * * * * *

Question: Would you have a problem with students presenting gifts to the Earth in an Earth Day ceremony?

Answer: I had no difficulty at all with the activity that we ran at the high school.

Question: That would include offering gifts to the Earth?

Answer: Right. I had no problem with that.

(Tr. 465-466).

Invasions of Family Privacy

Plaintiffs allege that defendants have conducted various activities which although lacking religious overtones, violate the plaintiff-parents' Fourteenth Amendment privacy right to exempt their children from educational activities which interfere with their right to direct the upbringing of

their children. In *Immediato v. Rye Neck School Dist.*, 73 F.3d 454, 462 (2d Cir.1996), *cert. denied,* 519 U.S. 813, 117 S.Ct. 60, 136 L.Ed.2d 22 (1996), our Court of Appeals recognized the claimed right of a parent to direct the upbringing of his or her children, but held that any challenged activity be analyzed only under the minimal rational basis standard of review. Thus, the defendants need only prove that the activities at issue are based on a legitimate state interest and that the activities are rationally related to furtherance of that objective. *Id.*

Plaintiffs challenge the following activities: Giving children the homework assignment of observing and reporting on the activities of family members; administering the Myers-Briggs personality test; telling the students to keep a journal which could include their most intimate thoughts on private matters; implementing the Yale Decision Making Program; and administering counseling to students. Plaintiffs do not seek to stop these activities outright, but rather, seek advance parental notification of these activities with the ability to "opt-out" their children as they see fit.

In *Immediato*, our Court of Appeals held that as the Supreme Court has recognized, the state has a "compelling" interest in educating its youth, to prepare them to participate effectively and intelligently in our open political system, and to be self-reliant and self-sufficient participants in society. 73 F.3d at 461. The homework assignment and the journal activity were writing exercises that were clearly educational in nature. Plaintiffs concede that students were told they had the right to staple-close any personal and private portions of their journals before they were read by

the teachers. OPCALS at 18-19. These writing assignments, although intrusive in nature, do further the state's compelling objective of education, and thus do not violate plaintiffs' Fourteenth Amendment rights.

The evidence also reveals that contrary to plaintiffs allegations, the Myers-Briggs Personality Test was, and is, conducted at the district schools only after advance parental notice is mailed to parents, with a right to opt-out their student from testing.[21] (Tr. at 338). Regardless of the opt-out opportunity, student testing is well within the realm of legitimate educational goals and thus plaintiffs claim on this issue does not rise to the level of a constitutional or statutory violation.

The Yale Decision Making Program (Plaintiffs' Exhibit 18) is a program implemented as part of the sixth grade curriculum, conducted over several weeks in twelve sessions of 40-minute periods. (Tr. at 363). This program, which was developed by the Department of Psychiatry at Yale University, was created to attempt to help children make good choices and good decisions, to weigh the nature of the decisions they make, to access different types of data, and to make judgments that are productive and proper choices. (Tr. at 362). The program contains lessons on stress and stress management and also includes a relaxation exercise. The Court finds that the Yale Decision Making Program rationally furthers the district's objective of

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21. This advance notice and opt-out ability also makes relief claimed under *N.Y. Public Health Law* § 2504 moot.

educating students to make informed decisions and to be self-reliant and self-sufficient participants in society.

Plaintiffs also appear to argue for a blanket opt-out right to all objectionable activities within the district. The Court fails to find any constitutional basis for such a right. Assuming, *arguendo,* that the *Immediato* case grants such a right, this Court finds the testimony of Dr. Dennis on the district's reasons for refusing to offer a parental opt-out program, credible and persuasive in a context not involving First Amendment rights:

> The notion of parental opt out requires that parents know in somewhat exhaustive detail prior to any kind of teaching episode what is going to be occurring, what materials will be used. And I assume a presumption of that is that they would then have the right to have their [children] participate, after which–so after being given, for example, notice of a particular activity or lesson, the teacher would need to do so in enough time to give the parents an opportunity to respond; the parent might then choose not to have his child participate; the teacher would have to then construct an alternate assignment which presumably would need to have the parent approve as well. This could go on and on and literally tie the hands of education to proceed. So I couldn't support that kind of general opt out.

(Tr. at 455). Based on this evidence, this Court finds that the district's refusal to offer this general opt-out right is rationally related to the furtherance of the district's

educational objectives and therefore lawful as to the non-First Amendment issues in the case.

This finding, however, does not limit defendant's otherwise legal obligation to obtain parental consent. The most notable of these obligations is *New York Public Health Law* § 2504 which requires, in relevant part, the district to obtain parental consent prior to providing health or medical services. Thus, to the extent the district engages in any student counseling, it is required by that statute to obtain parental consent if such counseling is medical or health related. Plaintiffs have failed to prove in the context of this case that such counseling was imposed without consent on their children. *New York Public Health Law* § 2504 applies to the issue. This issue of student counseling having been decided under New York State statutory law, this Court need not address whether the challenged activity violates plaintiffs Fourteenth Amendment parental right to privacy. *See Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter").

CONCLUSION

Plaintiffs are entitled to the entry of a final injunction which would: (1) prevent school sponsorship of worship of the Earth or continued presentation of a liturgy addressed to the Earth as if it were the Creator, or divine, including prayers of any kind to the Earth, whether or not derived from the culture of the American Indians, or as set forth in

Plaintiffs' Exhibit 62; (2) remove the Worry Dolls from the school system and refrain from sponsoring charms or suggesting that tangibles have supernatural powers; (3) prohibit any direction to a student to make a likeness or a graven image of a god or religious symbol; and (4) direct the adoption of a published policy which will contain clear instructions to teachers and others to implement within the school system the Supreme Court standards set forth in the cases quoted earlier in this decision, in order that the school district shall remain neutral towards all religions, neither sponsoring nor disparaging any religious belief, and shall not coerce any student to participate in religion or its exercise or to violate any religious precept held by a child or his or her parents. The policy shall provide that persons teaching students, who are not regular members of the faculty, such as psychics, yogis and rockhounds, shall be informed of these limitations before being invited.

In all other respects, all relief shall be denied.

Counsel are directed to meet and discuss the form of a final judgment and may agree on the form without conceding the correctness of this decision or waiving any appellate rights. The Court will not approve any injunction which requires the Court to retain any generalized continuing jurisdiction over the Bedford School District beyond enforcing its specific terms.

Plaintiffs are prevailing parties, at least in part, and are entitled to recover their legal fees and costs to the extent attributable to that portion of the claims as to which they prevailed. Counsel if so advised may submit an application setting forth the total lodestar and the portion attributable to

those services as to which Plaintiffs prevailed, which application shall be served and filed with the Court on or before June 4, 1999. Opposing papers, if any, shall be received by June 18, 1999, at which time the fee application will be regarded as fully submitted for decision.

A proposed final judgment shall be settled on notice or submitted pursuant to waiver of notice to the Court on June 18, 1999, or earlier.

SO ORDERED.

Supreme Court, U.S.
FILED
JUL 27 2001
OFFICE OF THE CLERK

No. 00-1932

In the Supreme Court of the United States

OCTOBER TERM, 2000

MARY ANN DiBARI, individually and as lawful guardian of minor children, Krystal M. DiBari and Tiana N. DiBari,

Petitioner,

–v.–

BEDFORD CENTRAL SCHOOL DISTRICT *et al.*,

–and–

ROBERT M. ALTMAN *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 00-1932

In the United States Supreme Court

OCTOBER TERM, 2000

MARY ANN DiBARI, individually and as lawful guardian of minor children, Krystal M. DiBari and Tiana N. DiBari,

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BEDFORD CENTRAL SCHOOL DISTRICT *et al.*,

–and–

ROBERT M. ALTMAN *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Should certiorari be granted when the Circuit Court's holding that the Earth Day celebration did not constitute an endorsement of religion was consistent with established First Amendment law and in addition was based upon a factual finding that the challenged activity was not coercive?

2. Should certiorari be granted to modify the well settled rule that a governmental act of compulsion must exist for there to be a violation of the Free Exercise Clause?

3. Should certiorari be granted when the Circuit Court's holding that the petitioner, a municipal taxpayer, lacked standing to challenge school activities was based on a factual finding that petitioner did not show a measurable appropriation or loss of revenue attributable to the challenged activities?

STATEMENT OF THE CASE

The Circuit Court held that the District's annual observation of "Earth Day", a day of activities centered around the theme of conservation of the environment and preservation of the planet, did not violate the Establishment Clause and the Free Exercise Clause of the First Amendment. The Establishment Clause was not violated in that the District's sponsorship of the Earth Day program, which was, in part, an effort to comply with §810 of the New York Education Law that designates the last Friday of April as "Conservation Day", had a secular purpose, students were not compelled to participate in the ceremonies, and a reasonable observer would not find that the ceremonies had the effect of endorsing a religion. There was no violation of the Free Exercise Clause because the Earth Day ceremonies did not have a religion-burdening effect and attendance was not compulsory.

Other challenged activities occurring at the Pound Ridge Elementary School, consisting of assigning elementary school students to make a paper cutout of the elephant-headed Hindu God "Ganesha", the making of "worry dolls" and the sale of "worry dolls" in a school store, and the playing of a tape called 'Listening to Nature" in a class at the Fox Lane Middle

School were dismissed on the ground that at the time of the trial no plaintiff had standing to challenge those activities.[1]

The Circuit Court's holding that the Earth Day ceremonies do not violate the Establishment Clause and Free Exercise Clause of the First Amendment and its dismissal of the claims pertaining to Ganesha, worry dolls and the Listening to Nature tape for lack of standing are the subject of the Petition for Writ of Certiorari.

The Petition for a Writ of Certiorari should be denied because it is mostly comprised of argument that the Circuit Court made erroneous factual findings concerning the nature of the Earth Day ceremonies and the attendance requirement. The decision does not conflict with decisions of other circuits. This Court's well established tests for review of alleged violations of the Establishment Clause and the Free Exercise Clause were recognized and applied by the Circuit Court. The Petition for a Writ of Certiorari represents nothing more than petitioner's disagreement with the Circuit Court's application of the established law to the facts of this case. These are not grounds for the granting of certiorari under Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE FACTS

Earth Day

In April of each year, the students and faculty of the Fox Lane High School gather in front of the school for one hour in celebration of "Earth Day". The Earth Day celebration is

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[1] The plaintiffs challenged numerous programs of the District as being in violation of their constitutional rights. The District Court dismissed the majority of their claims except for the Earth Day ceremonies and the three other activities which were eventually dismissed by the Circuit Court for lack of standing.

organized by Youth in Action, a high school club involved in social and environmental activity. (App. 10a).[2] Sean Scorsone ("Scorsone"), a high school senior who was President of Youth in Action, testified that the purpose of the event is "to inform students about the situation with the environment and also to help promote respect for the environment and for each other". (A.877)[3]

In recent years the center of the Earth Day celebration has been a large globe on a tripod which is placed in the circle in front of the school. Drums are played to draw the student body around the globe. (App. 10a). Scorsone testified that senior citizens are invited to attend "to foster respect, to show the school community and show the senior citizens themselves that they are an important part of the community".(A.879). He added that each class presents metaphorical gifts during the celebration such as wisdom, knowledge and respect. (A.879). Traditionally, the faculty advisor, Dale Saltzman ("Saltzman"), makes some opening remarks and guest speakers address the student body. (App. 10a).

Plaintiff Jon DiNozzi testified that at one such event, Saltzman stated, "We come from the Earth, we're part of the Earth and we're all involved in this cycle. One day we'll become them [senior citizens] and then we'll go back to the earth." (A.129). On a second occasion, Saltzman was quoted by Jon DiNozzi as saying, "There's just too many people on this Earth. We need to do something about it." (App. 11a).

Plaintiffs placed into evidence an affidavit from Defendant High School Principal Richard Kraemer ("Kraemer") which had been submitted in support of Defendant's motion for

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[2] App. refers to the appendix of the Petition for Writ of Certiorari.

[3] Refers to the Record before the Circuit Court.

summary judgment. In that affidavit, Kraemer stated that attendance at the Earth Day celebration "is not required." (A.1107 at ¶4). He added that

> The suggestion by Plaintiffs that the observance of Earth Day constitutes the celebration of "Gaiaism the religion of Earth Worship" or otherwise constitutes a religious activity is without any factual basis. There is no religious purpose to this observance and any religious content, if it occurs, is purely incidental. (A.1107 at ¶5).

In an attempt to characterize this benign ceremony as "religious", Petitioner, Mary Ann DiBari ("DiBari") misrepresents the globe on the tripod as an "Earth-totem", the ceremony as a "ritual", and Salzone's remarks as a "sermon". (Petition, pp. 3-4).

DiBari submits as part of a lodging an article written by a student in the school newspaper in an effort to show that the Earth Day ceremonies were religious. (Lodging, p.1).[4] The article, which describes the previous year's ceremonies, noted that "symbolic structures such as the teepee last year, are provided along with a chorus of drums to add to the festivities." DiBari misreports the "chorus of drums" and festivities as "[a] chorus of ceremonial tom-toms played throughout the ritual." (Petition, p. 4)

The student journalist also notes that each year symbolic gifts are given to the Earth by representatives of each class.

---

[4] Copies of documents not in the record that shed light on the arguments in a case may be "lodged" with the Court. Robert L. Stern et al., Supreme Court Practice, p. 556 (7th ed. 1993). The documents lodged by the petitioner are trial exhibits which are part of the record. (Petition, p.3, n.1). The documents are therefore improperly "lodged" with the Court.

The "gifts" are merely in the form of a speech. The article reports that previous Earth Day ceremonies included such obvious non-religious events as the celebration of the 50th anniversary of the United Nations wherein 50 students carrying the flags of their representative countries paraded around the circle. Also, a theme of Earth Day the previous year was the conditions of rain forests throughout the world. Students marched around the circle carrying banners displaying the current state of the world's rain forests.

DiBari portrays the theme of Earth Day as "honoring the Earth" as if the District is compelling its students to engage in some type of ritualistic "Earth worship". The student journalist reports otherwise. She states that "the recurring theme that Mr. Saltzman, the coordinator of the Earth Day, has provided for us in all his presentations is that Earth Day is about reflecting on the simple things that the Earth provides for us and maybe, for one day, not taking them for granted."

In an article written by another student journalist reporting on the 1998 Earth Day ceremony, she describes the program as "speeches by several Fox Lane faculty members and a musical performance [by two students]. Presentations of several national flags to add to Fox Lane's collection were made, along with individual presentations of symbolic gifts to the earth presented by the president and vice-president of each class." (Lodging, p.2). A student she interviewed declared: " I enjoyed the ethnic diversity of the multicultural presentation of flags." The student journalist concluded: "[n]o doubt ... students and teachers alike enjoyed the opportunity to take in some fresh air and sunshine, listen to some excellent music, and take a break from their regular routine."

The 1998 Saltzman memorandum to faculty which comprises page 3 of the Lodging is merely a plea to staff to make the students aware of the Earth Day celebration.

Contrary to DiBari's assertion that the entire high school student body attended every year (Petition, p.11), attendance was not required as explained in the Kramer affidavit referenced *supra*. Dibari claims that students were expected to attend the "ritual" in order to have the District's message "reinforced" and "driven home". As depicted in the memorandum, Saltzman notes that the message conveyed at Earth Day ceremonies is merely that there should be an "honoring of the elders" [referring to the senior citizens who attend the ceremonies], and "respect for the Earth".

Ganesha

During the 1992-1993 and 1993-1994 school years, Jacqueline Reizes ("Reizes"), a teacher at the District's Pound Ridge Elementary School, included in her classroom instruction a unit on India and its culture. As part of the India unit, the children were exposed to various aspects of Indian culture including music, art, dance and foods. Reizes decorated her classroom with wall hangings of saris, textiles, travel posters and pictures of Indian life, one of which depicted a statue of Ganesha, an elephant-headed Indian God being carried through the streets of Bombay during the Ganapathy Festival. (App. 7a). Next to the picture was a written description which stated in part:

> Ganesha is a round bellied, good natured Hindu god. He loves to eat.
>
> Those who worship Ganesha bring him gifts of fruit.
>
> Ganesha is the god of wisdom and success. People pray to him before they begin important projects. (A.1098)

Reizes also read to her class a two page story entitled "How Ganesha Got His Elephant Head" as part of the unit on India and its culture. She testified that she was not attempting to promote Hinduism by these activities, and that neither the Ganesha picture or story had any religious significance to her. (A.741-742, 748).

In addition to the foregoing, Reizes engaged her students in an arts and crafts project in which they made construction paper cutouts of Ganesha. (App. 8a). An example of one student's cartoon-like project was admitted into evidence (A.1126). Reizes testified that no religious message was intended by this activity project. When asked why she had chosen Ganesha as an arts and crafts project, Ms. Reizes responded,

> Most children I know really like animals. It could have been a monkey. I could have read another story about a monkey, but I went with elephant. This was a light-hearted craft project which followed the reading of a story. (A. 742-743).

Melissa Landau and J. C. O'Brien, each of whom had been students in Reizes' 1992-93 fourth grade class, testified that the making of a construction paper "Ganesha elephant" had no religious significance to them. (A.763-773).

Reizes stated that she developed the India unit for her third grade class in accordance with the New York State Department of Education third grade social studies curriculum guide. This guide, entitled "Communities Around the World", provides suggested approaches for teaching about individual world communities. For the study of Indian culture, the guide suggests teaching third grade students about the Hindu festival of Diwali which celebrates the homecoming of Rama, reading the story of Rama and Sita, and conducting a mini-Diwali

festival. Finally, the guide suggests as an arts and crafts project, having the students make monkey stick puppets, which represent the "Monkey King" and his army of clever monkeys [who] helped Rama kill the mean King Ravana and rescue Princess Sita." (A.113-129).

Reizes said that in her class she substituted Ganesha for Rama and Sita because it was easier for her to find materials about Ganesha. Her India unit followed the same sequence and general structure as was recommended by the guides, with the construction of a paper Ganesha replacing the "Monkey King" puppet as an arts and crafts project. (A.746-747).

DiBari's claim that Reizes instructed the students to make the images in clay is not supported by the Record. (Petition, p.7). While plaintiffs Krystal and Niki DiBari and Joseph DiNozzi testified that Reizes had instructed her classes to make likenesses of Ganesha out of clay but that these projects were never completed, their testimony was flatly disputed by four other students who had been in either Ms. Reizes' 1992-93 or 1993-94 class (A.764, 770, 774, 785) and by Ms. Reizes who testified that not only had she not given her students such an assignment, but also that such an activity would not be appropriate for third grade students who do not have the manual dexterity to make complex little clay figures. (A.748).

"Worry Dolls"

Several of the infant Plaintiffs, as well as other student witnesses testified that, as elementary school students, they made "worry dolls" as a crafts project in the school's Discovery Center. Similar dolls were sold in the school store. (App. 9a). "Worry dolls" are multicolored little dolls made out of toothpicks, thread and wire with a painted face. (App. 9a). Joseph DiNozzi and Russell Altman testified that they were told by school personnel that if they placed these dolls

under their pillows at night they would ward away bad dreams. (App. 9a). There is no evidence in the record that such comments, if made, were in any way authorized by Defendants. Rachel Ostrow, one of the student witnesses called to testify by Defendants, said that she had been told "that it was Guatemalan culture, that the children there would make a worry doll and put it under their bed and it was supposed to take bad dreams away". She stated, however, neither she nor any members of her class were told to place the "worry dolls" under their own pillow. (A.807, 808).

Listening to Nature Tapes

Plaintiffs introduced into evidence an audio tape entitled "Listening to Nature" which was played to students at the Fox ne Middle School. The District Court, quoting at length from the text of a tape recording entitled "Listening to Nature" found that the tape contained Native American "prayers to Mother Earth" and that the playing of these tapes for students violated the First Amendment in that "this activity was a direct presentation to the children of an Earth-centered religious belief". (App. 146a-148a). The Court's ruling was made despite the fact that there is absolutely no evidence in the record that any student ever heard the prayers, or that it was ever intended that any student hear the prayers. (App. 14a).

The only witness to testify at trial regarding the playing of the tapes was Ruthann Funari, a life science teacher at the Fox Lane Middle School. Ms. Funari testified that she purchased the tape, which was described by the District Court as interspersing "prayers and invocations sonorously uttered along with background sounds of forest and ocean" (A.974) because she wanted to use the nature sounds as background for an in-class writing assignment regarding the natural environment. (A.811-814).

Ms. Funari stated that she played the tape on one occasion in November 1998. She did not introduce the tape before she played it nor did she use the accompanying text in any way. Most significantly, because she only wanted the students to hear the nature sounds and did not intend them to hear the words, she turned down the volume on the tape whenever the voices came on so that only the sounds could be heard. She stated that she did not believe any of the students heard the prayers. (A.816).

The Standing Issue

When this action was commenced, at least one plaintiff was eligible to attend Pound Ridge Elementary School, at least one was attending or eligible to attend Fox Lane Middle School, and at least one was attending or eligible to attend Fox Lane High School. When the case was tried, however, plaintiff Ross Altman was the only plaintiff of elementary-school age; and he and his family had previously moved out of the District. Thus, by the time of the trial, no plaintiff could claim any direct injury from the Ganesha and Worry Doll activities conducted at Pound Ridge Elementary School. (App. 47a).

Similarly, at the time of trial, the only plaintiff attending Fox Lane Middle School was Tiani DiBari. However, she graduated from that school in 1999. Although one or more of the DiNozzi children remained age-eligible to attend the school, the DiNozzi family relocated from the District the day after judgment was entered in the District Court. Thus, no plaintiff could claim any direct injury from the playing of the "Listening to Nature" tape. (App. 48a).

The Circuit Court ruled that Mary Ann DiBari did not have standing as a municipal taxpayer to claims under the Free Exercise Clause because none of the DiBaris could meet the requirement that they assert violations of their own particular

freedoms. (App. 47a). DiBari also lacked standing under the Establishment Clause because there was no showing of a measurable appropriation or loss of revenue attributable to the challenged activities at the schools. (App. 48a-49a).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. Certiorari should not be granted when the Circuit Court's holding that the Earth Day celebration did not constitute an endorsement of religion was consistent with established First Amendment law and in addition was based upon a factual finding that the challenged activity was not coercive.

DiBari argues that due to the "heightened scrutiny" accorded First Amendment claims in the public school setting, the Circuit Court erred in not concluding that the Earth Day ceremonies subtly coerced impressionable students to engage in "Earth Worship" in violation of the Establishment Clause. (Petition, p.16).

There are three tests used by the Supreme Court to determine whether the Establishment Clause has been violated. The first is the three pronged *Lemon* test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971) wherein the challenged school practice must (1) have a secular legislative purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion.

The second test, which the Court set forth in Lee v. Weissman, 505 U.S. 577 (1992) is the so-called "Coercion Test" under which school-sponsored religious activity is analyzed to determine the extent, if any, of its coercive effect on students. "Although it is conjunctive, this, too, is a tripartite

test: 'Unconstitutional coercion [occurs] when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.'" Doe v. Beaumont Independent School District, 173 F.3d 274 (5th Cir. 1999), citing Jones v. Clear Creek Independent School District, 977 F.2d 963, 970 (5th Cir. 1992), cert. denied, 508 U.S. 967 (1993).

The third test is known as the "Endorsement Test". It seeks to determine whether the government endorses religion by means of the challenged action. County of Allegheny v. ACL, 492 U.S. 573 (1989).

Under any of these tests, the initial inquiry is whether the challenged activity is "religious" within the meaning of the Establishment Clause. While attempting to define religion in a given case can be a "notoriously difficult" task, Alvarado, v. City of San Jose, 94 F.3d 1223, 1226 (9th Cir. 1996), one circuit court has identified the essential characteristics, or indicia of religious beliefs as follows,

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs. Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981)

As noted by Judge Adams in his concurring opinion in Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979), the "formal and external signs" include "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays, and other

similar manifestations associated with the traditional religions."

In applying the above analysis, the Ninth Circuit rejected the contention that so-called "New Age" beliefs constituted a religion for Establishment Clause purposes. Alvarado, supra. In so doing, that court noted the absence of any text, creed or associated organized group, stating,

> The New Age proponents cited by plaintiffs clearly indicate that there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals or guidelines; no particular object or objects of worship; no requirement or suggestion that anyone give up the religious beliefs he or she already holds. 94 F.3d at 1229.

Similarly, in Fleischfresser v. Directors of School District 200, 15 F.3d 680 (7th Cir. 1994), the court addressed a claim by various parents that the use of a textbook series which allegedly focused upon "wizards, sorcerers, and unspecified creatures with supernatural powers" violated the Establishment Clause. In rejecting that claim, the court stated,

> The parents insist that the reading series presents religious concepts found in paganism and branches of witchcraft and satanism, this hardly sounds like the establishment of a coherent religion. 15 F.3d at 687.

See also Peloza v. Capistrano Unified School District, 37 F.3d 517, 520 (9th Cir. 1994) (holding that neither evolution nor secular humanism is a religion).

The Earth Day ceremonies are certainly not a formal religious exercise where the recurring theme as noted in one of

the student newspaper articles lodged by the petitioner is respect for one' elders and the environment. While DiBari attempts to portray Earth Day as a form of "Earth Worship" by misrepresenting the annual ceremonies as the "Earth Day Liturgy", the globe on a tripod as an "Earth-totem", speeches as "sermons" and the playing of drums as "ceremonial tom-toms", the record reveals that the day is merely one of environmental and social awareness and appreciation.

The District was not advancing religion at the Earth Day ceremonies. Furthermore, the element of coercion identified in Lee, supra, was also not met in that there was no obligation on the part of the students to participate in the ceremonies. The Kraemer affidavit states that attendance was not mandatory and there is no contrary evidence in the record that students were compelled to attend. To the extent that DiBari claims that the Circuit Court made an erroneous factual finding in concluding that attendance was not mandatory, Rule 10 of the Rules of the Supreme Court provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings ...".

DiBari cites the decision in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) in which the Court found that student-led prayers at school football games violated the Establishment Clause, for the proposition that mandatory attendance is not a prerequisite for a determination that students were coerced into participating in the challenged activity. In Santa Fe, attendance at football games was mandated for cheerleaders, members of the band and the team members themselves. For those students who were not mandated to attend, there existed "immense social pressure, or truly genuine desire, felt by many students to be involved in the extra-curricular event that is American high school football." Id. at 292.

The facts in this case do not indicate that the school district created a situation in which students were faced with public pressure or peer pressure to participate in religious activities. *See* Bown v. Gwinnett County School District, 112 F.3d 1464 (11th Cir. 1997) (no pressure to participate in silent meditation during class). It is highly unlikely that students have an overwhelming desire or face public pressure or peer pressure to attend a ceremony in which the focus is on respect for senior citizens and the environment.

In addition, the "impressionability of students" is not relevant if the school is not actually advancing religion. In Good News Club Et Al. v. Milford Central School, ___ U.S. ___, 121 S.Ct. 2093 (2001), the Court, commenting on its decision in Edwards v. Aguillard, 482 U.S. 578 (1987), stated:

> Moreover, we did note that mandatory attendance requirements meant that State advancement of religion in a school would be particularly harshly felt by impressionable students. But we did not suggest that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue. Id at 2105.

In analyzing whether there is an endorsement of religion in the public school context, the inquiry must be undertaken from the perspective of an "objective observer in the position of an elementary school student." Brown v. Woodland Joint Unified School District, 27 F.3d 1373, 1378 (9th Cir. 1994), citing Kreisner v. City of San Diego, 1 F.3d 775, 783 (9th Cir. 1993) cert. denied, 510 U.S. 1044 (1994). As noted in Brown, to apply a subjective standard would have a devastating impact on school programs.

> If an Establishment Clause violation arose each time a student believed that a school practice either advanced

> or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a "curriculum review committee" unto himself or herself. 27 F.3d at 1379.

See also Fleischfresser, 15 F.3d at 689 n. 9 (rejecting subjective "impressionable child" standard).

The Circuit Court correctly concluded that no objective observer would perceive the Earth Day ceremonies as a message of endorsement of the Gaia religion or any other religious practice. (App. 57a-59a). The activities were not intended to be religious, which, contrary to DiBari's assertion (Petition, p.16), is extremely relevant in determining the context of a challenged activity. Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring in judgment); nor was there any evidence that the District was advancing religion during the Earth Day celebration.

II. Certiorari should not be granted to modify the well settled rule that a governmental act of compulsion must exist for there to be a violation of the Free Exercise Clause.

It is well-settled that in order to prevail on a claim alleging a violation of the Free Exercise Clause of the First Amendment, it must be proven that there was governmental compulsion to engage in conduct that violated the Plaintiffs' religious convictions. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981); see also Mozert v. Hawkins County Board of Education, 827 F.2d 1058, 1065 (6th Cir. 1987).

As observed by Justice Jackson fifty years ago in McCollum v. Board of Education, 333 U.S. 203 (1948), it is essential to a claim of infringement of a public school student's

free exercise rights that there exist some compulsion to perform a religiously prohibited ritual or make a religiously prohibited affirmation. Noting the large number of separate religious bodies existing in the United States, he wrote:

> If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits. 333 U.S. at 235.

In Mozert v. Hawkins County Board of Education, supra, Plaintiffs alleged that a public school requirement that all students use a prescribed set of reading textbooks which contained material contrary to their religious beliefs violated their rights under the Free Exercise Clause. Finding the element of compulsion absent, the Sixth Circuit denied the free exercise claim,

> The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that the participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religions. 827 F.2d at 1065.

Similarly, in Grove v. Mead, 753 F.2d 1528 (9th Cir. 1985), the Ninth Circuit rejected a "religiously based" parental challenge to a particular classroom reading assignment which the parent argued was offensive to her religious beliefs. The Court concluded that the use of the book at issue was not a religious activity but served a secular educational function. Judge Canby's concurring opinion is particularly apt. He noted that while the Free Exercise Clause "protects individuals from

governmental interference with their religion in the absence of compelling justification (citations omitted), it does not protect the individual from being religiously offended by what the government does". 753 F.2d at 1542. Moreover, "[t]he inevitability of this conflict between Plaintiffs' religious rejection of 'secularism' and the secularization of society suggests why antipathy alone, however sincere, is never enough to sustain a free exercise challenge ... were the free exercise clause violated whenever governmental activity is at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible." Id.

In the instant case, the Circuit Court correctly held that no violation of the Free Exercise Clause existed when the students were not compelled to attend the Earth Day ceremonies. A relaxation of the coercion standard when there are "impressionable students" involved, as advocated by DiBari, would invariably give rise to a plethora of Free Exercise challenges to activities which have no religion-burdening effect, but are merely found offensive to a plaintiff's beliefs. None of this Court's rulings suggest that its Free Exercise Clause jurisprudence has gone this far.

III. Certiorari should not be granted when the Circuit Court's holding that the petitioner, a municipal taxpayer, lacked standing to challenge school activities was based on a factual finding that petitioner did not show a measurable appropriation or loss of revenue attributable to the challenged activities.

As noted in the Statement of Case, by the time this action was before the Circuit Court, no plaintiff could claim any direct injury from the "Ganesha" and "worry doll" activities at Pound Ridge Elementary School and the playing of the "Listening to Nature" tape at the Fox Lane Middle School as

the result of aging-out of the school building or moving from the District. In that both the DiNozzi and Altman families relocated from the District, the only remaining plaintiff was DiBari whom the Court found lacked standing as a municipal taxpayer under the Establishment Clause and Free Exercise Clause.

The Circuit Court's decision followed this Court's ruling in Doremus v. Board of Education of Borough of Hawthorne, 342 U.S. 429 (1952). Doremus, the seminal case regarding taxpayer standing to assert a violation of the Establishment Clause, involved a parental challenge to the reading of the Old Testament in a public school. Because the child had graduated from school prior to the appeal, the Court found that no standing existed as a result of the parental relationship. 342 U.S. at 432-433. Turning to the issue of the plaintiffs' status as taxpayers, the Court similarly rejected the argument that such status provided them with standing to raise the Establishment Clause claim, finding the plaintiffs had failed to allege "that this activity [Bible reading] is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." Id, 433. The Court noted:

> It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference . . . the appellants cannot obtain a decision from this Court by a feigned issue of taxation. Id. 434-435.

In the instant case, it has only been shown that DiBari is a resident and taxpayer whose tax contributions go to support the Bedford Central School District. The record is devoid of any proof as to how her pecuniary interests are impacted by the challenged activities. Likewise, Plaintiffs have never alleged that the challenged activities are supported by any separate tax

or appropriation or that they add any sum whatsoever to the cost of school operations.

"In order to establish state or municipal taxpayer standing to challenge an Establishment Clause violation, a plaintiff must not only show that he pays taxes to the relevant entity, he must also show that tax revenues are expended on the disputed practice." Doe v. Duncanville Independent School District, 70 F.3d 402, 408 (5th Cir. 1995) (emphasis added). See also Cammack v. Waihee, 932 F.2d 765, 770 (9th Cir. 1991); Doe v. Madison School District No. 321, 177 F.3d 789 (9th Cir. 1999).

In Doe v. Madison School District No. 321, supra, a municipal taxpayer contested the reading of a prayer during high school graduation ceremonies. The Court noted that the plaintiff did not identify any tax dollars that defendants spent solely on the graduation prayer. Instead, the plaintiff alleged that defendant spent tax dollars on renting a hall, printing graduation programs, buying decorations, and hiring security guards. "But those are ordinary costs of graduation that the school would pay whether or not the ceremony included a prayer. Therefore, those expenditures cannot establish taxpayer standing." Id., 794. The Court continued:

> This case is legally indistinguishable from Doremus, in which the school's expenditures for teachers' salaries, equipment, building maintenance, and the like were insufficient to confer taxpayer standing despite their indirect support of the Bible reading. Id.

As in the above-cited cases, Plaintiffs do not assert a direct dollars-and-cents injury but rather a religious difference. As Doremus and its progeny make clear, this is insufficient to support a taxpayer standing to raise an Establishment Clause claim.

The decision of the Fourth Circuit in Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999) is factually distinguishable. In that case, a retired teacher and state taxpayer challenged the constitutionality of a statute which provided for paid school holidays of the Friday before Easter and the Monday following. In contrast to the instant case, the plaintiff was able to maintain standing upon a showing that her tax dollars funded the paid, statutory holidays for school employees.

The Court's recitation in ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989), of the principle articulated in Commonwealth of Massachusetts v. Mellon, 262 U.S. 447 (1923), commonly known as Frothingham v. Mellon, that a municipal taxpayer's relationship to the municipality is "direct and immediate", does not compel the conclusion advocated by DiBari that the only injury a municipal taxpayer need show is an improper municipal expenditure. As the Circuit Court noted, "under Frothingham we presume a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the challenged activity involves a measurable appropriation or loss of revenue." (App. 46a). DiBari has utterly failed to show a measurable appropriation or loss of revenue attributable to the challenged activities at the schools.

With respect to DiBari's Free Exercise claim, she has to demonstrate that a particular law or practice has a coercive effect which operates against the plaintiff's practice of his/her religion. Fleischfresser v. Directors of School District 200, 15 F.3d 680, 689 (7th Cir., 1994), citing Abington School District

v. Schempp, 374 U.S. 203, 223. The requirements for standing to challenge state or municipal action under the Free Exercise Clause include proof that particular religious freedoms are infringed. McGowan v. Maryland, 366 U.S. 420 (1960); Abington v. Schempp, 374 U.S. at 225, n.9. Thus, Free Exercise claims, by their very nature, require a plaintiff who has allegedly been subjected to the objected religious activity. A municipal taxpayer who is not directly affected by the alleged religious activity lacks standing to maintain an action under the Free Exercise Clause because his/her interest is only financial. See McGowan, 366 U.S. at 429, 81 S.Ct. at 1106-07; Grove v. Mead School District No. 354, supra.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Northport, New York
July 24, 2001

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No. 00-1932

In the

Supreme Court of the United States

Mary Ann DiBari, individually and as lawful guardian of minor children, Krystal M. DiBari and Tiana N. DiBari,

Petitioner,

versus

Bedford Central School District *et al.*,

AND

Robert M. Altman *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I. The Petition for certiorari is not premised on any claim of erroneous fact-finding.

Respondents' brief in opposition to the Petition for certiorari portrays the Petition as "an argument that the Circuit Court made erroneous factual findings." (OB.3)[1] On the contrary, both the Petition and the circuit court opinion note that the essential facts are undisputed. (Pet.2; App.3a)

The Earth Day Liturgy

Concerning the "Earth Day liturgy," respondents' brief either admits or concedes the following facts:

- Each year on "Earth Day" the entire high school student body was summoned by drums to assemble around a large globe on a tripod, which was "the center of the Earth Day celebration." (OB.4)
- Before this globe, students presented "symbolic gifts" or "metaphorical gifts" *to the Earth*, including "wisdom, knowledge and respect." (OB.4-5)
- The ritual was devised and coordinated by teacher Saltzman, whose own memorandum states that the purpose of the ritual is "an *honoring of the Earth* as the home of all of us." (Lodging.1-3)
- The student newspaper observed that the ritual involves "conducting ceremonies *to honor the earth*." (Lodging.1)
- Saltzman delivered Earth-oriented speeches before the globe on the tripod, including: "We come from the Earth, we're part of the Earth, and we're all involved in this cycle," and "There's just too many people on this Earth. We need to do something about that." (OB.4)

Since none of these facts was disputed, the Petition does not rest on any claim of "erroneous factual findings." (OB.3) Rather, the Petition seeks this Court's *de novo* review of the circuit court's constitutional errors in overturning the district court's legal conclusion that the "Earth Day liturgy" violated

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[1]. "OB" signifies respondents' opposition brief.

the First Amendment. The circuit court's contrary legal conclusion conflicts with relevant decisions of this Court and the decisions of other circuits which follow this Court's "subtle coercive pressure" standard for Establishment clause violations in public schools. Further, this case presents an opportunity for this Court to clarify whether "subtle coercive pressure" is the standard for determining violations under both religion clauses.

For these reasons, the Petition conforms to the criteria in Rule 10 (c) of the Rules of the Supreme Court.

Rather than addressing the undisputed facts, respondents do precisely what they accuse Petitioner of doing: debate the facts. For example, respondents cite a self-serving affidavit from the defendant high-school principal: "there is no religious purpose to this observance [the Earth Day ceremony] and that *any religious content, if it occurs, is purely incidental.*" (OB.5) Of course, there is no *de minimis* defense to Establishment Clause violations. *Lee*, 505 U.S. at 594. Thus, the affidavit's implication that "incidental" religious activity in the Earth Day liturgy is acceptable verges on a stipulation of liability.

Petitioner takes exception to respondents' claim that the Petition "misrepresents" the record when it describes the Earth Day ritual as "the Earth Day liturgy" and the globe on a tripod as an "Earth totem." (OB.15) Both descriptions are taken from *the findings of the district court*. (App.143a, 72a)

Equally false is respondents' claim that the Petition "misrepresents" the record by stating that "a chorus of ceremonial tom-toms played throughout the ritual." (*Id.*) It was the district court, not Petitioner, which found that the "Earth Day liturgy" involved "a chorus of ceremonial drums" (App.70a) and that the "chorus of drums [was] playing throughout the presentations." (App.144a)

In fact, it is respondents who misrepresent the record—repeatedly. For example, respondents falsely assert that the Saltzman memorandum states "merely that there should be an honoring of the elders" and "respect for the Earth" (OB.3),

when it also states: "At the core of each gathering has been and will continue to be *an honoring of the Earth* as the home of all of us," and that students would be expected to present "gifts given by each of us to others *and to the Earth* in the form of encouragement, *compliments*, help and *service*."

Respondents also misrepresent the record when they assert that there is "no contrary evidence" to rebut the claim of former principal Kraemer that attendance at the Earth Day liturgy was not compulsory. The student newspaper described the ritual as "a bunch of teachers and Student Government kids running a ceremony that *we had to watch*." (Lodging, p.2) Even the circuit court noted that "Bedford characterized the Earth Day activities as, in part, an effort to comply with § 810 of the New York Education Law" which provides that "*It shall be the duty of the authorities of every public school in this state to assemble the pupils*" to participate in appropriate Conservation Day activities. (App.11a) In other words, respondents have claimed that attendance at the Earth Day liturgy is either "optional" or statutorily mandated, depending on which claim serves their interests at the moment.[2]

Classroom Prayers to the Earth

Here too the facts are undisputed: a Bedford teacher played audiotaped prayers to the Earth, including: "Holy Earth Mother, the trees and all nature are witnesses of your thoughts and deeds." (App.147a) If the prayer had been instead "Holy Mary, Mother of God, all of nature is witness to the creation of your son, Jesus," there is little doubt that the circuit court would have affirmed the district court's injunction.

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[2] In any case, the Petition does not rest on any factual dispute over whether attendance at the Earth Day liturgy was strictly mandatory, since this Court's "subtle coercive pressure" standard–which the circuit court failed to follow—does not require a showing of mandatory attendance at a challenged public school activity. *Lee,* 505 U.S. at 594-95.

Respondents further misrepresent the record by claiming "there is absolutely no evidence in the record that any student ever heard the prayers [to the Earth]" played in the middle school classroom. (OB.10) Even the circuit court noted that "Mary Ann DiBari testified, however, that her granddaughter Tiana heard the prayers or invocations." (App.14a) Respondents themselves admit that teacher Funari testified only that she "believed" no student heard the prayers because she (allegedly) turned down the volume whenever a prayer was uttered. (OB.11) The district court was evidently not persuaded by Bedford's "volume control" defense, and its finding that the prayers were heard was not disturbed by the circuit court, which dismissed the claim based solely on its view of standing.

Lord Ganesha

Respondents' opposing brief admits that students in the elementary school were instructed by their teacher to make "a paper cutout of the elephant-headed Hindu God 'Ganesha.'" (OB.2) Respondents—once again arguing issues never reached by the circuit court—characterize this activity as "cultural study." (OB.7-8) The district court, however, found that directing elementary school children to make an image of a Hindu god violates the First Amendment. (App.120a; 72a) That is, the district court applied the First Amendment to images of Lord Ganesha just as surely as it would have been applied to images of Jesus Christ.

The circuit court never addressed the district court's factual finding that the children were also instructed to make clay images of the Hindu deity, but ran out of time to do so. (App. 118a) Respondents, in a further factual argument, suggest that the teacher-witness was more credible than the student witnesses on this point. (OB.9) For purposes of this Petition, however, all the district court's fact-finding on Ganesha remains undisturbed.

Worry Doll Talismans

Respondents do not really deny Bedford's promotion of the

classroom creation and purchase in the school store of talismanic "worry dolls," which students were told would take away their bad dreams and worries if placed under their pillows. (App. 120a-121a) Instead, respondents suggest that the testimony of their student-witness on this point is more credible than that of Petitioner's student-witnesses. (OB.10) But here too the district court's fact-finding remains undisturbed by the circuit court, due to the circuit's decision on standing.

In sum, respondents fail to demonstrate their claim that the Petition is merely an argument over fact-finding.

II. The Establishment Clause bars state promotion of any religious practice or concept.

Respondents' opposing brief, like the circuit court opinion, wrongly casts the legal issue regarding the Earth Day liturgy in terms of whether the ritual promoted an *organized religion* of Earth-worship or Gaiaism. (App. 57a; OB.13-14) Respondents have failed to address, and thus conceded, the Petition's argument that the Establishment clause prohibits not merely state advancement of an organized religion as such, but also any religious *concept* or practice, "even though it is neither a part of nor derives from a societally recognized religious sect." *Malnak v. Yogi*, 440 F. Supp. 1284, 1313 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3rd Cir. 1979). That is why this Court has made it clear that the state may not use its power to promote any "particular kind of religious concept." *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961). Accordingly, in *Lee* this Court found an Establishment Clause violation in the form of subtle coercive pressure to attend a commencement address including a fleeting, non-denominational invocation unattached to any religion.

The circuit court reached the erroneous legal conclusion that a ceremony in which student leaders honor the Earth and offer gifts of "wisdom, knowledge and respect" and "service"

no way be seen by an impressionable *student* observer as state endorsement of the *religious concept that the earth is a higher* being deserving of worship and praise. (OB.52) That legal conclusion is inconsistent with the broad view of religion this Court and other circuits have taken for purposes of Establishment Clause analysis. (See, Pet.14)

Indeed, the circuit court itself has noted in another case that for Establishment Clause purposes the term "worship" is broadly understood as "'[t]he reverent love and *devotion* accorded a deity, *an idol*, or a sacred *object* [and][t]he ceremonies, prayers, or other religious forms by which this love is expressed,'" and that the term "prayer" means "[a] reverent Petition made to God, a god, or *another object of worship*.'" *DeStefano v. Emergency Housing Group, Inc.* 247 F.3d 397, 412, n. 8 (2nd Cir. 2001) There is no question that the Earth Day liturgy involved at least student expression of "devotion" to an "idol" or "sacred object"—namely, the planet Earth—and "reverent petitions" to the Earth in form of the "metaphorical gifts" students were induced to present before the Earth-totem.

Recognizing that the circuit court took a rather blinkered view of the term "religion," respondents attempt to amplify the circuit court's opinion by claiming the court held that "no objective observer would perceive that the Earth Day ceremonies as an endorsement of the Gaia religion *or any other religious practice.*" (OB.17) The circuit court held nothing of the kind. Its analysis focused on whether the Earth Day liturgy promoted the Gaia religion. (See, App.57a-58a)

III. Respondents (like the circuit court) contradict this Court's "subtle coercive pressure" standard.

As argued in the Petition, the circuit court ignored and contradicted this Court's standard in *Lee* of "subtle coercive pressure" for Establishment Clause violations, holding instead that the Earth Day liturgy was not coercive merely because

that the Earth Day liturgy was not coercive merely because attendance was not "required." (Pet.19; App. 56a, 63a) The circuit court therefore failed to consider whether coercion was present in the form of the peer or social pressure this Court deemed impermissible in *Lee*, 505 U.S. at 594-95 and in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-12 (2000). In fact, the circuit court never once considered that it was dealing with impressionable youth—a key factor in this Court's school cases. *Lee*, 505 U.S. 577 at 592.

Respondents concede this point by failing to address it in their opposing brief. Instead, they merely assert (OB.15) that "the element of coercion identified in *Lee* was also not met because there was no obligation on the part of students to participate in the ceremonies."—precisely the argument rejected in *Lee*.

Recognizing that the circuit court failed to follow the "subtle coercive pressure" standard, respondents argue for a finding that the circuit court never made: that there was no peer or social pressure to attend the Earth Day liturgy. (OB.15-16) The undisputed record facts, however, are that the Earth Day liturgy was part of the curriculum for the whole "Fox Lane family"—even assuming it was not formally mandatory—was devised to comply with the statutorily mandated Conservation Day observances, and was an activity which, as one student complained, "we *had to watch*." (See, Pet.5) The existence of at least peer or social pressure to attend is undeniable, and the circuit court did not find otherwise.

IV. Petitioner does not seek to "modify" the requirement of governmental compulsion in free exercise analysis.

Contrary to what respondents suggest Petitioner does not seek certiorari "to modify the well settled rule that a governmental act of compulsion must exist for there to be a

have completely misread the Petition on this point.

The Petition requests certiorari in part so that this Court can clarify *what level* of governmental compulsion triggers a free exercise violation in the public school setting. Even respondents concede that this Court requires only "some compulsion" by government. (OB.18) How, then, is the standard of "some compulsion" in the realm of free exercise different from the "subtle coercive pressure" standard for Establishment Clause cases? Petitioner believes that (at least in the public school context) the two standards are functionally identical, and that this Court should say so.

Citing inapposite textbook challenge cases, respondents assert there was no governmental compulsion here but only mere exposure to offensive ideas. But respondents fail to mention that in *Grove v. Mead School District*, 753 F.2d 1528 (9th Cir. 1985), the Ninth Circuit noted that if the reading of morally offensive textbooks were alleged to have "eternal consequences" for plaintiff's child, "such a belief might well require her being excused from . . . exposure" on free exercise grounds, and that a free exercise claim would probably have been presented if the child had been forced to read the material *or even to hear it read* in class. *Id.* at 1543.

In *Mozert v. Hawkins County Board of Ed.*, 827 F.2d 1058 (6th Cir. 1987) the Sixth Circuit found "no proof in the record that any plaintiff student was required to engage in role play, make up magic chants, read aloud or engage in the activity of haggling," but that even "some compulsion" to engage in such activities would have given rise to a colorable Establishment Clause claim. *Id.* at 1069. Why not also a free exercise claim?

V. Respondents' standing argument avoids the issues.

Respondents' opposing brief fails to address, and thus concedes, the Petition's argument that the district court correctly concluded that Petitioner, who has custody of two grandchildren

in Bedford's high school, was entitled to a district-wide injunction since the challenged activities (such as audio-taped prayers to the Earth) were likely to recur in any district school, and that Petitioner therefore had standing because she has two children in the defendant school system. (App.78a) (Pet.26-27) The circuit court likewise did not address this argument. (App.47a-50a) [3]

As for municipal taxpayer standing, respondents' effort to distinguish *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000) is unavailing. Respondents concede that the *Koenick* court properly found standing because "tax dollars funded the paid, statutory holidays" on Good Friday and Easter Monday. (OB, 22) Likewise, in this case (as the district court found) tax dollars funded the salaries of the teachers who engaged in the challenged activities.

Respondents' "distinction" could thus be formulated as the full-salaried-day rule: if a municipality pays a public school teacher for a full day of challenged activity (such as taking a religious holiday), there is municipal taxpayer standing, but if the challenged activity (such as directing children to make images of a Hindu god) involves less than a full day's salary, there is no standing. That result is absurd.

The pair of Fifth Circuit cases respondents cite are inapposite, since neither involved participation in challenged activities by teachers or other salaried employees. *Doe v. Madison School District No. 321,* 177 F.3d 789 (9th Cir. 1999) (student-led prayer involving no expense); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (distribution of Gideon Bibles by Gideons) Indeed, the *Duncanville* court indicated that the result would have been different had salaried

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[3] The circuit court does appear to have assumed, however, that activities which first occurred in one Bedford school could not occur again in another Bedford school. (App. 50a)

teachers merely handled the Gideon Bibles. 70 F.3d at 408 There is far more teacher activity involved here.

The circuit court's conflict with the Fourth Circuit's decision in *Koenick* presents an excellent opportunity for this Court to clarify the law on municipal taxpayer along the lines suggested by four justices in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989)—namely, that municipal taxpayers can show direct and immediate injury from improper municipal expenditures, given their close relation to the municipal burse.

If the ACLU and local residents had standing to challenge placement of a Catholic organization's Nativity scene on public property without any county tax expenditure, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), then surely Petitioner had standing to challenge blatant First Amendment violations by salaried teachers of a school district her taxes support, and in which she still has two children.

The requested clarification of the law of standing would prevent manipulation of the standing requirement to avoid the merits of disfavored but meritorious claims, as happened here.

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